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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION OIL COMPANY OF CALIFORNIA
and TOSCO CORPORATION,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTION PRESENTED FOR REVIEW

Where Congress directed the Department of Energy to adjust petroleum price controls in order to overcome regulatory disincentives for investments in tertiary crude oil recovery, was the Department authorized to continue its program of subsidies for these investments after decontrol removed all such regulatory disincentives? *

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* The parties in the proceedings below were Union Oil Company of California, Tosco Corporation, the Department of Energy, and James B. Edwards, Jr., Secretary of Energy. The list required by Rule 28.1 is set forth at the end of this petition.

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UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Union Oil Company of California ("Union") and Tosco Corporation ("Tosco") respectfully petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States to review that court's judgment of September 1, 1982, in *Union Oil Company of California v. Department of Energy, et al.*, No. 9-60, and in *Tosco Corporation v. Department of Energy, et al.*, No. 9-61.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and appears as Appendix A to this petition. The findings of fact, conclusions of law, opinions, and judgments of the district courts in *Union* and *Tosco* appear as Appendices B through F; the opinions are reported at 530 F. Supp. 717 (C.D. Cal. 1982) and 532 F. Supp. 686 (D. Nev. 1982). The order of the court of appeals deny-

ing Union's and Tosco's petitions for rehearing and suggestions for rehearing *en banc* appears as Appendix G. The court of appeals' order granting Union's motion for a stay pending application for review in this Court appears as Appendix H.

JURISDICTION

The court of appeals entered judgment on September 1, 1982, and denied the petitions for rehearing and suggestions for rehearing *en banc* of Union and Tosco on October 5, 1982. This Court has jurisdiction under section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (1976) (incorporated by reference in the Emergency Petroleum Allocation Act of 1973, as amended, Section 5(a), 15 U.S.C. § 754(a) (1976)), as further provided in 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY MATERIALS INVOLVED

This case involves Sections 4(a) and 8(j)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §§ 753(a) and 757(j)(1) (1976); Executive Order 12287, 3 C.F.R. 124 (1982); Ruling 1981-1 of the Department of Energy, 46 Fed. Reg. 12945 (1981); and sections of the Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.78 and 212.131 (1981). These provisions are reproduced in Appendix I.

STATEMENT OF THE CASE

Under a succession of statutes beginning in 1970,[1] Congress first authorized and then mandated that some

[1] Congress' principal enactments included the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 1468; Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627; Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975); Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976). Congress also enacted numerous additional amendments, including one as late as June 30, 1980. *See* Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611, 711.

domestic crude oil be subject to price ceilings and that the remainder be permitted to be sold at world market prices. The regulatory programs under these statutes were administered by the Department of Energy and its predecessor agencies ("DOE").[2] In 1976, Congress directed DOE to adjust its petroleum price controls in order to overcome regulatory disincentives for investments in tertiary crude oil recovery.[3] On January 28, 1981, President Reagan issued Executive Order 12287, eliminating "effective immediately" the "remaining Federal controls" on crude oil and other petroleum products, and thus ending eleven years of price regulation in the industry.[4] This case concerns the lawfulness of the DOE's subsequent "Ruling 1981-1." In that ruling, the DOE said that, in spite of decontrol, crude oil producers could obtain additional subsidies under the Department's "tertiary incentive program" if they made new investments in tertiary crude oil recovery during the two months following decontrol. App. 95a. If upheld, these subsidies will cost crude oil refiners nationwide $500 million or more.[5]

A. The Statutory Background and Ruling 1981-1

The DOE's authority to control the price of petroleum products originated in the Economic Stabilization Act of 1970,[6] an "emergency measure to counter severe infla-

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[2] For convenience, the Department and its predecessor agencies, the Cost of Living Council, the Federal Energy Office, and the Federal Energy Administration, are all referred to herein as "DOE."

[3] *See* page 4 & n.11 *infra*.

[4] App. 93a; 17 Weekly Comp. Pres. Doc. 53 (1981).

[5] Union made this estimate based on data provided to the district court. *See* Stipulated Record in No. 9-60, at 56-57, 334-37, 417-19, 546-47. DOE, which has the best available data, did not question the estimate there or in the court of appeals. *Cf.* App. 14a n.8.

[6] Pub. L. No. 91-379, 84 Stat. 1468.

tion that threatened the national economy."[7] The Arab oil embargo in 1973, with its attendant shortages of petroleum products and the four-fold increase in world oil prices, led Congress to enact the Emergency Petroleum Allocation Act of 1973 ("EPAA").[8] That Act required DOE to allocate crude oil and refined products, and to continue controls on prices. According to the Conference Report, the need to continue price controls stemmed from the shortages.[9] Congress also recognized that the authority granted to DOE could itself adversely affect crude oil supplies, and directed the President to "assiduously avoid that result."[10]

Congress retained price controls in subsequent amendments to the EPAA and, at the same time, displayed increasing concern over the adverse effects of its own regulatory program. Indeed, the basic aim of the 1975 amendments was to alleviate the adverse effect of price controls on domestic crude oil production. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 458, 558 n.8 (1976). The following year, Congress took further steps to mitigate the regulatory disincentive to certain kinds of crude oil recovery. Among these steps, it authorized the "tertiary incentive program" at issue here, in order to avoid discouraging the recovery of oil from depleted wells through enhanced or "tertiary" recovery techniques which would otherwise be uneconomical under price controls.[11] Pursuant to Congress' directive to provide incentives "within the framework of the existing price regulatory

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[7] *Fry v. United States*, 421 U.S. 542, 548 (1975).

[8] Pub. L. No. 93-159, 87 Stat. 627, *codified in* 15 U.S.C. §§ 751 *et seq.*

[9] The continuation of price controls was intended to "prevent price gouging or price discrimination which might otherwise occur on the basis of the current shortages." H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 26 (1973).

[10] H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 14 (1973).

[11] *See* Energy Conservation and Production Act, § 122, Pub. L. No. 94-385, 90 Stat. 1125 (1976), *amending* EPAA § 8.

structure," [12] DOE in 1979 adopted regulations which permitted producers of crude oil to recover up to three-quarters of the cost of qualified tertiary project investments, by charging market prices for any oil otherwise subject to price ceilings. App. 96a-98a.

On January 28, 1981, Executive Order 12287 removed all of the regulatory disincentives to tertiary and any other domestic crude oil production, "effective immediately." Despite this instantaneous removal of the regulatory obstacle to tertiary investments, DOE's Ruling 1981-1 announced on February 12, 1981, that the tertiary program would continue for two full months after decontrol. The Department said that by investing in entirely new tertiary projects after decontrol, or making new investments in preexisting projects, producers would be able to obtain additional subsidies for their new investments by making retroactive increases in the price of oil sold before decontrol.[13] DOE's only apparent rationale for its Ruling 1981-1 was that it supposedly protected rights that had accrued to producers before decontrol under the DOE "certification" regulation.[14] App. 95a. The certification regulation, however,

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[12] S. Conf. Rep. No. 1119, 94th Cong., 2d Sess. 71 (1976).

[13] Three features of the tertiary program made it so attractive that some firms may have been reluctant to see it go, as shown by the briefs of *amici* below. First, the program permitted immediate reimbursement of "prepaid" tertiary expenses, even though the project might not begin immediately. *E.g.*, DOE Interpretation No. 1981-11, *Sun Oil Co.*, 46 Fed. Reg. 27293 (1981). Second, DOE permitted producers to claim tertiary incentives for expenses that were "paid" in interaffiliate transactions. *See* 46 Fed. Reg. 1246 (1981). Third, the program did not require a producer to recoup tertiary expenses through recertifications of oil that *he* had produced and sold as price-controlled crude oil; instead the producer could acquire an "interest" in someone else's previously-sold crude oil solely for the purpose of using it as the vehicle for recouping tertiary expenditures. *E.g.*, DOE Interpretation 1980-22, *Barber Oil Corporation*, 45 Fed. Reg. 61563 (1980); Stipulated Record in 9-60 at 352.

[14] In holding that Ruling 1981-1 was unlawful, the district court in *Union* went out of its way to make clear that its decision did not

had nothing to do with the purpose of the tertiary incentive program, *see* App. 6a, and DOE's litigation counsel promptly abandoned the "accrued rights" theory in the district court, suggesting that it may have been "technically inaccurate." [15] Ruling 1981-1 did not even mention the statute which authorized DOE to provide tertiary incentives or Congress' purpose in enacting it.

As the district court in *Union* observed, there was a "stampede" for tertiary benefits after decontrol, App. 50a, and the results of extending the tertiary program proved startling even to DOE. In response to complaints from refiners, DOE reconsidered Ruling 1981-1 about a month later, and found that a program which had been used only "moderately" during the period of price controls had suddenly assumed "phenomenal" proportions thereafter.[16] One hundred new tertiary projects were certified after decontrol,[17] as a program that previously served to mitigate a regulatory disability became an outright subsidy involving hundreds of millions of dollars.[18]

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cut off the rights of anyone who had already made tertiary investments and qualified for incentive benefits before decontrol. App. 53a, 68a.

[15] Brief of Department of Energy in *Union Oil Co. v. DOE*, 530 F. Supp. 717 (C.D. Ca. 1982), at 33 n.* (Sept. 16, 1981).

[16] 46 Fed. Reg. 17566 (March 19, 1981). Without mentioning any "accrued rights," DOE also tersely announced that crude oil producers could no longer rely on Ruling 1981-1 after March 19, 1981. *Id.* After subsequent rulemaking proceedings, DOE again changed course and ruled that producers could recover tertiary investments made between March 19 and March 31, 1982. 46 Fed. Reg. 36103 (July 13, 1981). DOE still did not explain how the congressional purpose justified Ruling 1981-1, although it promised to provide a "more extensive analysis" of its proceedings later; nearly a year and a half later, the analysis has not yet appeared. *Id.*; *see also* 46 Fed. Reg. 25315 (May 6, 1981); App. 14a-15a.

[17] General Accounting Office, Letter Report of September 29, 1981 at 1, Stipulated Record in No. 9-61 at 1873.

[18] *See* note 5 *supra*.

B. The Decisions of the District Courts

Union brought its action in the District Court for the Central District of California on April 22, 1981. The court granted Union's motion for summary judgment and explained its decision in both its Findings and Conclusions, App. 55a, and separate Opinion, App. 38a. After carefully reviewing the legislative history of the statute authorizing DOE to provide tertiary incentives, App. 46a-47a, 57a, 66a-68a, the court concluded that "the tertiary incentive program never was intended to enjoy a separate and independent existence apart from crude oil price controls," App. 46a, and that "Congress' purpose was limited to correcting the disincentive to tertiary production that had inadvertently been created by the then existing price controls." App. 66a-67a. The district court found that DOE had no authority to subsidize postdecontrol investments because "[o]nce price controls end, the need for a system of incentives designed to counteract some of the adverse effects of those controls also ends." App. 47a.

In a separate action brought by Tosco, the District Court for the District of Nevada upheld Ruling 1981-1.[19] App. 72a. Although Tosco briefed and argued the question of statutory authority (as did DOE), the court's memorandum decision and order did not address it.

C. The Decision of the Court of Appeals

The court of appeals heard the appeals in *Union* and *Tosco* together and upheld Ruling 1981-1.[20] In the court

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[19] The Nevada court sustained Tosco's separate challenge to provisions of the tertiary incentive program which permitted firms to recover expenses paid in interaffiliate transactions. The court of appeals reversed the district court on this issue, App. 32a-36a, but Tosco does not seek review of the question.

Both district court actions invoked the jurisdiction conferred by section 211(a) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. *See* 15 U.S.C. § 754(a).

[20] The court received briefs from twenty-seven companies as *amicus curiae*. App. 19a n.10.

of appeals, DOE maintained that Ruling 1981-1 was lawful because Congress authorized it to provide tertiary incentives "by means of" price controls, not "because of" them; and it argued that Congress did not intend merely to reduce disincentives to tertiary recovery, but had the "broader purpose" of "maximizing" investments in tertiary projects.[21] The court of appeals found that Ruling 1981-1 provided additional incentives for producers to make additional tertiary investments after decontrol in February and March 1981. *See* App. 27a. This result, the court said, was authorized because the EPAA directed DOE to provide "additional price incentives" for tertiary investments. *Id.* Without discussing the legislative history, the court of appeals characterized both sides' claims regarding the evidence of underlying congressional intent as "plausible." App. 26a n.21. The court concluded that the "number of close questions" presented in this case should all be resolved by according "great deference" to the agency. App. 36a.

Union and Tosco filed timely petitions for rehearing and suggestions for rehearing *en banc* which the court of appeals denied on October 5, 1982. App. 89a. On October 12, 1982 Union filed a motion to stay issuance of the court's mandate pending application for review in this Court. The court of appeals granted the stay on the same day. App. 91a.

REASON FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO PRESERVE THE ROLE OF COURTS IN ASSURING AGENCY RESPECT FOR CONFLICTING CONGRESSIONAL GOALS IN REGULATORY LEGISLATION.

The court of appeals upheld DOE's authority to stimulate tertiary investments after decontrol simply because the DOE had provided "additional price incentives for" tertiary production. App. 27a, *quoting from* EPAA Sec-

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[21] Brief of Department of Energy at 30-31 in No. 9-60 (Mar. 2, 1982); *see also* App. 26a.

tion 8(j)(1)(A). That DOE did indeed provide incentives for new investments after decontrol is not in dispute; in fact, the district court in *Union* found that Ruling 1981-1 provoked a "stampede" for additional benefits. App. 50a. However, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act." *Richards v. United States*, 369 U.S. 1, 11 (1962). The evident purpose of legislation permitting "price incentives" for some crude oil production was to strike a balance between the competing congressional goals of holding down crude oil prices and of minimizing disincentives to crude oil recovery. Although striking such balances is the substance of legislative policy choice, the court of appeals simply ignored the compromise that Congress achieved here. By adopting the agency's wholly one-sided claim that it had authority to "maximize" incentives for crude oil recovery, apart from the problem of price controls, the decision below undermines the role of the judiciary in assuring that agencies respect the boundaries established by Congress. The court's failure here to measure DOE's authority "by the purpose for which it was conferred," *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), should not go unreviewed by this Court.

From the beginning, the price regulatory program was controversial, because within Congress "all were agreed on the need to control inflation but opinion was sharply divided on the optimum measures for the Government to use."[22] DOE's regulatory authority has always reflected Congress' concern with the adverse effects of the price ceilings it required, particularly as the economic emergency that prompted the program receded into the past. Debate over the wisdom of attempting to hold the line domestically against long term world economic forces provoked sharp debate—with epithets like "stupid and

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[22] *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 750 (D.D.C. 1971) (three-judge court).

ironic" [23]—because price controls decreased domestic production, thereby resulting in *upward* pressure on price and *increased* dependence on expensive imported oil.[24]

The recognition that price controls were both cure and disease was reflected in the early price ceilings which divided all domestic crude oil production into two categories—"old" oil, which was subject to price ceilings, and "new" oil, which was not.[25] Over time, Congress repeatedly modified this basic division by adding additional categories of crude oil to the list of those that warranted the incentive of market prices.[26] In result, the regulatory program became increasingly complex as Congress attempted to fine tune its machinery to minimize the coun-

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[23] 122 Cong. Rec. 8757 (1976) (remarks of Sen. Bartlett). Critics of the regulatory program argued that price controls were self-defeating, since every domestic barrel of oil that was too costly to recover at price controlled levels would simply be replaced by a barrel of foreign oil imported at world market prices. *See, e.g., id.*; 123 Cong. Rec. 36059 (1977) (remarks of Sen. Bellmon); 123 Cong. Rec. 36060 (1977) (Sen. Percy calling "such a policy . . . ludicrous"). *See also, e.g.*, 119 Cong. Rec. 17761-63 (1973) (remarks of Rep. Hansen).

[24] President Reagan adverted to this phenomenon when he removed all price ceilings, stating that the DOE program had been in effect a "subsidy for the importation of foreign oil." 17 Weekly Comp. Pres. Docs. 53 (1981).

[25] The first category consisted essentially of oil production at pre-existing production levels, while the second category encompassed production that exceeded pre-existing levels, and was therefore permitted to be sold at market prices as an incentive to increased production. *See* 6 C.F.R. §§ 150.353, 150.354 (1974).

[26] Thus, for example, Congress in 1973 exempted "stripper well" production from price ceilings, Pub. L. No. 93-153, 87 Stat. 576, 590, and later required DOE to take special account of the effect of price ceilings on "deep horizon development," properties north of the Arctic Circle or on the Outer Continental Shelf, "new wildcat properties," properties on which production was declining, and so forth. *See, e.g.*, 15 U.S.C. §§ 757(b)(2)(A), 757(b)(2)(B), 757(d)(3)(A) (1976).

terproductive effects of controls.[27] During the life of the program, the Temporary Emergency Court of Appeals accordingly maintained that no part of the program could be viewed in isolation from the entire problem addressed by Congress.[28] Here, however, the court of appeals turned the legislative scheme on its head by adopting DOE's view that Congress intended to "maximize" tertiary production. The court's elevation of one aspect of Congress' conflicting aims "to the level of a 'precept' is absolutely without support in the Act or its legislative history." *Consumers Union of the United States, Inc. v. Sawhill*, 525 F.2d 1068, 1079 (Em. App. 1975) (*en banc*).

The legislative history of the tertiary amendment makes clear, as the district court recognized in *Union*, that Con-

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[27] Even DOE's complicated entitlements program, which required the monthly transfer of hundreds of millions of dollars among hundreds of refiners nationwide, was authorized because Congress thought it "essential" to mitigate competitive inequities caused by the "two-tier" pricing system. *Pasco, Inc. v. FEA*, 525 F.2d 1391, 1402 (Em. App. 1975).

[28] Thus, for example, the court upheld a DOE program which provided financial incentives to producers of synthetic fuels, not because Congress ever specifically granted regulatory authority over that industry, but only because "the price and allocation system created adverse side effects," and benefits were therefore necessary to "minimize the adverse effects those regulations have . . . ." *Atlantic Richfield Co. v. DOE*, 655 F.2d 1118, 1121, 1125 (Em. App. 1981). Unlike the tertiary program, DOE cut off all nonvested claims under that program on the date of decontrol, on the ground that providing benefits after all disincentives had been removed would further "no discernible regulatory purpose." 46 Fed. Reg. 36080, 36082 (1981).

Similarly, the court of appeals reversed a district court decision on the scope of the "stripper well" exemption because of the district court's "total reliance on production incentives" and its "fail[ure] to adequately weigh [the legislative goal of lower crude oil prices which is] the other side of the coin." *In re the Department of Energy Stripper Well Exemption Litigation*, No. 10-39 (Em. App. 1982), Slip op. at 35. *See also, e.g., Standard Oil Co. v. FEA*, 612 F.2d 1291 (Em. App. 1979); *Mobil Oil Corp. v. DOE*, 610 F.2d 796 (Em. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

gress never intended the program to have "a separate and independent existence" after decontrol. App. 46a. In the floor debates, the author of the amendment and every legislator who spoke in favor of the legislation made clear that Congress' purpose was simply to correct some adverse effects of Congress' own price control program. Senator Montoya sponsored the amendment to the EPAA authorizing tertiary incentives, and he made its limited objective plain.[29] When he introduced his amendment, Senator Montoya stated that "[t]he amendment . . . is an attempt to *unblock the road* toward full utilization of our domestic oil reserves. It is a way around *the problem presented by price controls* . . . ." 122 Cong. Rec. 18478 (1976) (emphasis added).

Those supporting the Montoya amendment also stated that they were acting to alleviate the effects of price controls. Senator Domenici, for example, said that the existence of price controls had prevented the marketplace from bringing about optimum secondary and tertiary production "because *the price that we have put on it* will just not pay for its extraction." *Id.* at 18479 (emphasis added). He thus told the Senate that the issue before it was whether to adjust the price controls to permit incentives immediately or wait an indefinite period of time until "there are no controls." *Id.*

Senators Glenn and Jackson strongly opposed the amendment, arguing that it was premature and would increase crude oil prices. *Id.* at 18481-82. In response, Senator Bentsen reemphasized the intent of the amendment's supporters only to overcome the investment disincentives imposed by controls:

> "For too long we have walked away from oil fields that we know contained oil. We walked away for one reason—because *artificial price controls* did not en-

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[29] As that of the sponsor, Senator Montoya's explanation "deserves to be accorded substantial weight." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *see National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

> able an individual to invest new money and improve his recovery techniques. . . . We must *remove the artificial restraint* that is preventing [tertiary] recovery. Senator Montoya's amendment would have the effect of removing these restraints. . . . We will never enjoy its benefits if we continue to frustrate its recovery by *restrictive, artificial price controls.*" *Id.* at 18487 (emphasis added).

Senator Bentsen also stressed that the amendment would not create any windfalls for producers. "We are not talking about increasing anyone's profit. We are talking about *letting the market work* and enabling an individual to invest in enhanced recovery techniques." *Id.* (emphasis added). Senator Montoya's bill was passed by a vote of 58 to 35. *Id.* at 18493.

The Conference Report, the "most dependable" indicator of Congress' intent,[30] reconfirmed that DOE was not authorized to stimulate investments after decontrol but only "within the framework of the existing price regulatory structure." S. Conf. Rep. No. 1119, 94th Cong., 2d Sess. 71 (1976). Indeed, the conference committee deliberations resulted in additional compromise between those who favored lower crude oil prices and those who favored decontrol, as Senator Montoya's bill was pared back to encompass only tertiary, and not secondary, recovery techniques. *Id.* The conferees reported that the amendment was intended to provide "additional price incentives to those extraordinary and high-cost enhancement techniques commonly associated with tertiary applications which are *uneconomical under today's pricing regimen.*" *Id.* (emphasis added).[31]

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[30] *North Haven Board of Education v. Bell*, 102 S. Ct. 1912, 1932 n.11 (1982) (dissenting opinion of Justice Powell).

[31] Until it issued Ruling 1981-1, even DOE agreed that tertiary incentives were appropriate only on account of the "pricing regimen" that existed under controls. In an early rulemaking notice, DOE specifically recognized that the legislative intent was not to provide incentives for all tertiary techniques, but only those "which would not and could not reasonably be expected to be undertaken under the present pricing regime." 42 Fed. Reg. 2646, 2653 (1977). And it declined to provide incentives for tertiary techniques not

In the light of what Congress actually said, the "interpretation" of congressional intent invoked by DOE and accepted by the court of appeals is untenable. The view that Congress authorized tertiary incentives in order to maximize tertiary investments, rather than merely to alleviate the adverse effects of price controls on those investments, miscontrues eleven years of congressional action in this area, and is at odds with everything Congress said about the specific program at issue here. There is, moreover, no basis in this Court's decisions for the court of appeals' "deference" to an agency view of its authority that was first advanced by the agency's litigation counsel.[32] And, especially in the context of complex regulatory legislation with conflicting aims, the adoption by the court below of DOE's "plausible" reading of the legislative history, because it was the view of DOE, App. 26a n.21, 36a, rather than a "plausible" reading that said exactly the opposite, App. 26a n.21, was an abdictation of the judicial role.[33]

The function of judicial review is to ensure that policy choices reflect those of accountable legislators, and not merely those of unelected administrators. At the heart of this proposition is the fact that legislation reflects compromise among "multifaceted points of view." *FPC v. Texaco, Inc.*, 417 U.S. 380, 400 (1974). Sometimes the congressional compromise, even when strong competing interests are at stake, is so decisive that a single objective may be paramount. Where that is so, this Court has

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shown to be "uneconomical at all controlled price levels under present conditions . . . ." *Id.* When it issued the final regulations, the agency reiterated that the tertiary program was intended to stimulate an "increased level of activity, *during the period of crude oil price controls* . . . ." 44 Fed. Reg. 51148 (1979) (emphasis added).

[32] *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971).

[33] This Court has long recognized that an agency "may not finally decide the limits of its statutory power." *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946).

not permitted an agency to upset the compromise even for compelling countervailing considerations, because those considerations have already been heard and the balance struck. *TVA v. Hill*, 437 U.S. 153 (1978); *FPC v. Texaco, Inc., supra.* On the other hand, if the compromise struck by Congress expressly requires the agency to preserve conflicting goals, the same rules of judicial review require that an agency not be permitted to elevate one aspect of the compromise to the level of a "precept." *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980); *Consumers Union of the United States, Inc. v. Sawhill*, 525 F.2d 1068, 1079 (Em. App. 1975) (*en banc*); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[34]

In this case, DOE's one-sided view that the EPAA gave it a mandate to "maximize" tertiary crude oil investments led it to continue, after the removal of price controls, a program of subsidies that was authorized and designed solely to relieve crude oil producers from the burdens of those controls. In doing so, DOE ignored the fundamental congressional concern over the proper limits of its price control authority and went beyond what even the most ardent congressional proponents of price deregulation ever hoped for—or tried to achieve through legislative compromise. For an agency to ignore the context of debate from which its mandate derives, as the DOE has done here, simply exploits as if it were a weakness the fact that congressional enactments require the reconciliation of sharply divided factions. By the same token, judicial deference to such action diminishes the very thing that gives legislation its stature.

Especially as the regulatory programs which Congress authorizes become increasingly complex, and embody multiple policy objectives, it becomes increasingly difficult to ensure that the agency with delegated authority will

---

[34] "Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant" to infer new rights "that, while serving one legislature purpose, will disserve the other." 436 U.S. at 64.

stay within its bounds. This recognition has, in recent years, led to escalating use of mechanisms like the legislative veto, and to calls within Congress for a more intensive standard of judicial review.[35] Preservation of Congress' policy choices through judicial review may be especially critical if, as the United States Court of Appeals for the District of Columbia Circuit has held, use of the one-house veto is unconstitutional.[36]

There is widespread recognition now that legislative programs do not achieve desired results without costs; regulation creates its own problems,[37] as this case per-

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[35] *E.g.*, McGowan, "Congress, Court and Control of Delegated Power," 77 Colum. L. Rev. 1119 (1977); S. Rep. No. 305, 97th Cong., 1st Sess. 89-91 (1981) (recommending legislation which would generally foreclose judicial reliance on an agency interpretation of its statutory authority); H.R. Rep. No. 435, 97th Cong., 2d Sess. 74-75 (1982) (same).

[36] *Consumer Energy Counsel of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3099 (U.S. Aug. 2, 1982). That case involved the phased deregulation of natural gas required by the Natural Gas Policy Act of 1978. Like the EPAA, that legislation involved "hotly disputed" questions "centering on proposals for price deregulation," *id.* at 435, and thus, also like the EPAA, sharply raised the question whether the administrative agency would stay within the bounds of a legislative compromise that had been reached with difficulty. *See also Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 102 S.Ct. 87 (1981), *restored for reargument*, 50 U.S.L.W. 3998.27 (U.S. July 2, 1982).

[37] The "regulatory reform" bills currently being debated in Congress would require additional procedures by which agencies evaluate the costs of regulatory programs. *See, e.g.*, 128 Cong. Rec. E4162 (daily ed. Sept. 15, 1982) (extension of remarks by Rep. Derwinski). *See also, e.g.*, Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164; Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Executive Order 12291, 3 C.F.R. 127 (1982) (President Reagan's program for agency identification of unnecessary regulatory programs); Executive Order 12044, 3 C.F.R. 152 (1979) (steps by President Carter to curtail overregulation); 11 Weekly Comp. Pres. Docs. 49 (1975) (President Ford proposing decontrol of petroleum industry in State of the Union message).

fectly illustrates. Here, Congress for eleven years attempted to strike the proper balance between alleviating abnormal economic hardships and the need for return to a free market environment. To achieve that balance, Congress gave DOE a complex mandate to alleviate some of the adverse effects that Congress specifically identified, including the effects of price controls on tertiary production. DOE's Ruling 1981-1, however, turned Congress' compromise into a $500 million subsidy program with a life of its own. By sustaining DOE's claimed authority to provide outright subsidies after decontrol—an authority not envisioned on *either* side of the debate about price controls—the decision below poses broad threats to the heart of legislative compromise. The decision warrants review by this Court.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States.

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November 4, 1982

LIST PURSUANT TO RULE 28.1

Union Oil Company of California and Tosco Corporation have no parent companies. Below is a listing of all companies (other than wholly owned subsidiaries) in which Union or Tosco has an ownership interest exceeding five percent.

Union Oil Company of California:

Ace Gas, Inc.; Adobe Canyon Corporation; Alfa-Oeste Empreendimentos Participaoe. E Servicos S/C Ltda.; Badger Pipe Line Company; Brea Agricultural Service, Inc.; Chem Central Corporation; Chicap Pipe Line Company; Companhia Brasiliera De Metalurgia E Mineracao; Cook Inlet Pipe Line Company; Cymoly Corporation; Everglades Pipe Line Company; Gravcap, Inc.; Gravity Adjustment, Inc.; Inland Corporation; International Speedway Corporation; Kyung in Energy Company, Ltd.; Los Angeles Oil Company; Miami Valley Corporation; Mid-County Chemical Company; Midwest PMS, Inc.; Minera Unionoil Chile, Ltda.; Moreland/Tarnutzer-Hamilton; Moreland/Warmington; Moreland/Hapsmith Partnership; Moreland/John Martin Company; Moreland/Pulley; Oil Shippers Service, Inc.; P-M-S West, Inc.; Platte Pipe Line Company; Quebec Columbium, Ltd.; Sam Bo Real Estate Company, Ltd.; Sanitation, Inc.; Sepulveda Oil and Gas Company; South Saskatchewan Pipe Line Company; Southcap Pipe Line Company; Superior Deshler Company; Tecumseh Pipe Line Co.; Union/Westates Partnership; UNOCO (Philippines), Inc.; USZ Associates; USZ Hotel Venture; Van Salt Water Disposal Company; W. Cam. Blk 595; West Texas Gulf Pipe Line Company; West Shore Pipe Line Company; Wolverine Pipe Line Company; Yellowstone Pipe Line Company.

Tosco Corporation:

Applied Molecular Genetics Inc.; South Central Oil Company; Whiting Petroleum Corporation.

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82 No. 771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION OIL COMPANY OF CALIFORNIA and
TOSCO CORPORATION,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 9-60

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California

(No. 81-1961—TJH)

No. 9-61

TOSCO CORPORATION,
Plaintiff-Appellant,
v.
UNITED STATES DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants-Appellees.

No. 9-63

TOSCO CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants-Appellants.

No. 9-64

TOSCO CORPORATION,
Plaintiff-Movant,
v.
UNITED STATES DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants-Respondents.

Appeal from the United States District Court for the District of Nevada

(No. CVR-81-99-ECR)

(Argued: June 10, 1982 Decided: September 1, 1982)

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Before CHRISTENSEN, JAMESON and ZIRPOLI, Judges.

JAMESON, Judge.

On January 28, 1981, President Reagan issued Executive Order 12287, which immediately exempted all crude oil and refined petroleum products from price and allocation controls. On February 19, 1981, the DOE issued Ruling 1981-1, which allows producers to continue to recoup certain expenses incurred in connection with the development of enhanced oil recovery (tertiary) projects, as long as the expenses were incurred, paid and reported prior to February 28 and March 31, 1981 respectively, through the recertification of crude oil sold in December, 1980 and January, 1981. The validity of Ruling 1981-1 is the primary issue on these appeals. In *Union Oil Company of California* v. *DOE, et al.*, the ruling was held invalid by the District Court for the Central District of California. (Appeal No. 9-60). Its validity was upheld in *Tosco Corporation* v. *DOE, et al.*, by the District Court for the District of Nevada. (Appeal No. 9-61).

No. 9-63 involves the validity of a so-called "in house" expense amendment allowing producers to recoup expenses paid to affiliated entities for development of tertiary projects. In No. 9-64 Tosco has moved for injunctive relief requesting this court to order the DOE to determine the amount of excess payments each crude oil producer received and pro-rate distribution to the refiner-participants in the Entitlements Program.

I. *Regulatory History*

A. *Crude Oil Price Controls*

Regulations administered by the DOE and its predecessor agencies governed the allocation and price of crude oil from August 19, 1973 until January 28, 1981. See 10 C.F.R. Parts 210-212. For purposes of the price controls, crude oil was divided into three categories. "Old" domestic crude oil was generally that portion of produc-

tion which did not exceed the base production control level and was subject to a "lower-tier" maximum price. "New" or "upper-tier" domestic crude oil, where production was in excess of the base period level, could be sold at significantly higher but controlled prices. The third category, "exempt oil," including foreign oil, and domestic oil, newly discovered or produced from a stripper well or pursuant to tertiary recovery techniques, could be sold at uncontrolled or market prices.[1] See 10 C.F.R. Part 212, subpart D.

The regulations required each producer to certify the category of crude oil sold to a purchaser. 10 C.F.R. § 212.131. This was necessary to ensure that a purchaser not pay a price in excess of the maximum allowable for the category of crude oil purchased. The regulations did not initially specify when the certifications had to be made. As a result of complaints of long delays in making the required certifications, the DOE amended its regulations in 1975 to impose a two month limit on the issuance of certifications by producers.[2] The two-month limitation period provided greater predictability and stability to refiners' crude oil costs while still allowing producers adequate time to determine the correct classification for which a given volume of crude oil had qualified. 40 Fed. Reg. 13522, 13523 (March 27, 1975).

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[1] By December, 1980, the average prices of lower-tier and upper-tier crude oil were respectively $7.49 and $15.51 per barrel, while the average price of exempt crude oil was $34.55 per barrel, 46 Fed. Reg. 14157, 14158 (Feb. 26, 1981).

[2] 10 C.F.R. § 212.131(a)(6) stated in pertinent part:

> Certifications required by this paragraph (a) to be made with respect to each sale [of *inter alia*, tertiary incentive crude oil] shall be made within the consecutive two-month period immediately following the month in which that sale is made. After the close of [that period] no certification, other than a certification of lower tier ("old") crude oil, shall be effective with respect to the purchases of that crude oil, except where such certification explicitly is required or permitted by DOE order, interpretation or ruling.

B. *The Tertiary Incentive Program*

Tertiary enhanced recovery techniques are higher cost production methods which maximize oil production from a depleting field.[8] In 1976 Congress directed the DOE to amend its price regulations to provide "additional price incentives for bona fide tertiary enhanced recovery techniques." Energy Conservation and Production Act (ECPA) § 122, 15 U.S.C. § 757(j)(1)(A). Pursuant to that directive, on July 26, 1978, the DOE adopted an amendment to its price regulations, 10 C.F.R. § 212.78 (1979), which provided that increased production of crude oil resulting from a qualified and certified enhanced recovery project would be exempt from price controls. 43 Fed. Reg. 33678 (Aug. 1, 1978). This regulation created a new category of exempt crude oil known as "tertiary incremental crude oil." Effective September 1, 1978, crude oil produced by using tertiary techniques could be sold at market prices.

Concluding that further production incentives were needed, the DOE amended 10 C.F.R. § 212.78 to add the so-called Tertiary Incentive Program (not to be confused with the Tertiary Incremental Program previously adopted). This program was intended "to provide front-end money to producers engaged in the initiation or expansion of tertiary enhanced crude oil projects . . ." up to a limit of 20 million dollars per project. 44 Fed. Reg. 18677 (March 29, 1979).

Effective January 1, 1980, the Tertiary Incentive Program permitted a producer to recoup up to 75% of the "allowed expenses" it had "incurred" and "paid" in connection with a "qualified tertiary enhanced recovery project." 10 C.F.R. § 212.78(c). Producers were permitted

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[8] Tertiary techniques typically include the injection of carbon dioxide, steam, or other substances in order to increase pressures in the oil reservoir and thereby promote additional production. See 10 C.F.R. § 212.78(c).

to self-certify their projects as "qualified" and their expenses as "incurred" and "paid," subject to possible DOE audit. 10 C.F.R. § 212.78(d). Allowed expenses which had been incurred, paid, and reported could be recouped by selling otherwise price-controlled crude oil at uncontrolled market prices. 44 Fed. Reg. 51148, 51149 (Aug. 30, 1979). No limitations were imposed on prepaying tertiary expenses, so a producer could currently recoup prepaid expenses even though the tertiary enhanced recovery project might not be begun for a period of months or even years. 45 Fed. Reg. 40106, 40107. (Aug. 15, 1980).

In order to allow tertiary producers that sold little or no price-controlled crude oil to benefit from the program, the DOE permitted a producer with an interest in a qualified tertiary project to purchase a temporary interest in another producer's price-controlled oil, Interpretation 1980-22, 45 Fed. Reg. 61563, 61564 (Sept. 16, 1980), or to sell other producers a temporary interest in its tertiary project. Interpretation 1981-3, 46 Fed. Reg. 27281 (May 18, 1981). To add even more flexibility, the DOE allowed

> [p]articipating producers with respect to a particular project [to] attribute the recoupable allowed expenses among themselves in whatever proportion they determine, regardless of their actual interest in the project. This flexibility will permit participants in a project to agree upon internal business arrangements with minimal governmental interference.

44 Fed. Reg. 51148, 51149 (Aug. 30, 1979).

In other words, except for the two-month recertification limitation in § 212.131(a)(6)[4] and the requirement

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[4] Because 10 C.F.R. § 212.131(a)(6) required that certifications be made "within the consecutive two-month period immediately following the month in which [the] sale [was] made," the typical industry practice was to sell crude oil at an indeterminate price,

that the producer have an interest in the particular tertiary project, there were no limitations as to when or where the crude oil had been produced. The producers could certify or recertify previously price-controlled crude oil as tertiary incentive crude oil and then bill purchasers at the market price for that oil, as long as the additional revenue then received did not exceed the allowed tertiary expenses incurred, paid, and reported by the producer.

C. *The "In-House" Expenses Amendment*

When the Tertiary Incentive Program was first implemented the definition of "recoupable allowed expenses," 10 C.F.R. § 212.78(c), did not permit recovery of in-house expenses, i.e., those incurred between affiliated entities. On August 8, 1980, the DOE proposed to amend the definition to include in-house expenses, as long as they did not exceed the price that would have been paid in an arms-length transaction. 45 Fed. Reg. 54-688 (August 15, 1980). Following a lengthy period for comment,[8] the DOE on December 29, 1980, adopted the "in-house" amendment, effective January 5, 1981, 46 Fed. Reg. 1246 (January 5, 1981). Section 4(c) of the Administrative Procedure Act, 5 U.S.C. § 553(d) requires that publication of a rule be made at least 30 days before its effective date. The DOE addressed this requirement in the preamble to the final rule, concluding that it satisfied two of the three statutory exceptions to § 4(c), namely that it "relieved a restriction" and there was "good cause" for immediate adoption.

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with the understanding that the market price would be charged (*e.g.*, through retroactive invoicing) if the crude oil within the two months following the month of sale.

[8] The DOE received 27 comments. 25 favored the amendment. None opposed it. Tosco was not one of the commenters.

D. *The Entitlements Program*

Although the validity of the Entitlements Program, 10 C.F.R. § 211.67, is not directly challenged in this litigation, the program does affect the ultimate impact of the Tertiary Program on refiners and the consuming public. The DOE promulgated the Entitlements Program in 1974 to permit all refiners to share proportionately in the financial benefits resulting from the availability of a limited quantity of relatively inexpensive, price-controlled crude oil. 39 Fed. Reg. 42246 (Dec. 4, 1974).

Under the Entitlements Program, a refiner was required to have one "entitlement" for each barrel of "deemed old oil" that it refined.[6] Refiners with greater access to price-controlled crude oil made cash payments to refiners with less access to such oil. These payments were made pursuant to a monthly "Entitlements Notice" which specified the amount of money to be paid or received by each refiner. The price of an entitlement was roughly the difference between the price of controlled and uncontrolled crude oil. These transactions allocated lower-priced crude oil among domestic refiners without requiring the actual physical transfer of this oil.[7]

Certifications of price-controlled crude oil as exempt crude oil under the Tertiary Incentive Program reduced the total amount of crude oil production subject to price controls each month and therefore increased the total cost of the available crude oil supply. As a result, the benefits of price-controlled crude oil which were distributed among all refiners by the Entitlements Program were reduced.

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[6] "Deemed old oil" was defined at 10 C.F.R. § 211.67(b)(2). Generally, one barrel of lower-tier crude oil equalled one barrel of deemed old oil. One barrel of upper-tier crude oil equalled a specified fraction of a barrel of deemed old oil, which was computed monthly.

[7] For a more detailed description of the Entitlements Program see *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (TECA 1975), *cert. denied*, 426 U.S. 947 (1976) and *Pasco Inc.* v. *FEA*, 525 F.2d 1395-96 (TECA 1975).

Thus, to the extent that crude oil producers sold otherwise price-controlled crude oil as uncontrolled crude oil under the Tertiary Incentive Program, the higher cost of such uncontrolled crude oil was distributed among all domestic refiners through the operation of the Entitlements Program.

E. *Decontrol of Crude Oil*

President Reagan's Executive Order 12287, issued on January 28, 1981, provided in pertinent part:

> By the authority vested in me as President by the Constitution and statutes of the United States of America, including the Emergency Petroleum Allocation Act of 1973, as amended [15 U.S.C. § 751 et seq.], . . . and in order to provide for an immediate and orderly decontrol of crude oil and refined petroleum products, it is hereby ordered as follows: Section 1. All crude oil and refined petroleum products are exempted from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended. The Secretary of Energy shall promptly take such action as is necessary to revoke the price and allocation regulations made necessary by this Order.
>
> . . .
>
> Sec. 3. The Secretary of Energy may, pursuant to Executive Order No. 11790 as amended by Executive Order No. 12038, adopt such regulations and take such actions as he deems necessary to implement this Order, including the promulgation of entitlements notices for periods prior to this Order and the establishment of a mechanism for entitlements adjustments for periods prior to this Order.
>
> Sec. 4. The Secretary of Energy is authorized to take such other actions as he deems necessary to ensure that the purposes of this Order are effectuated.
>
> . . .

46 Fed. Reg. 9909-10 (January 30, 1981).

The Executive Order was made effective immediately because "advance notice of and public procedure on the decontrol provided by this Order would be likely to cause actions that could lead to economic distortions and dislocations. . . ." *Id.* at 9910.

On January 29, 1981, President Reagan issued a memorandum to his cabinet officers, including the Secretary of Energy, directing them to postpone for 60 days the effective date of all regulations that had not been promulgated in final form and which were scheduled to become effective during the 60-day period. 46 Fed. Reg. 11227 (Feb. 6, 1981) (RA 1519). The postponement was ordered to permit "full and appropriate review [of] many of the prior Administration's last-minute decisions," *id.*, and would have applied to the in-house expenses amendment if it had not been made effective immediately. This 60-day postponement period expired on March 30, 1981, one day before the DOE deleted the provisions of the Tertiary Incentive Program from the Code of Federal Regulations. 46 Fed. Reg. 20508, 20509 (April 3, 1981).

F. *Ruling 1981-1*

On February 12, 1981, the DOE issued Ruling 1981-1 in which it stated that crude oil sold during December 1980 and January 1981 could be certified or recertified during the two-month period following the month in which the crude oil was sold, if such oil "would have otherwise qualified for lawful recertification (or certification) prior to the implementation of the Executive Order." 46 Fed. Reg. 12945, 12947 (question and answer no. 5) (Feb. 19, 1981).

With respect to the Tertiary Incentive Program, the Ruling, in Answer 7, reads:

> Absent the Executive Order, a qualified producer that would have incurred, paid, and reported its allowed expenses prior to February 28 and March 31,

1981 respectively, could have recovered those expenses through the recertification of crude oil sold in the months of December 1980 and January 1981, respectively, as long as those recertifications were made within the consecutive two-month period within which such certifiction is permitted under 10 C.F.R. 212.131(a)(6). Executive Order 12287 is intended to provide for an immediate decontrol of crude oil and refined petroleum products. The Order does not abrogate the right that accrued to a firm to establish prices for crude oil prior to January 28, 1981. Thus, a firm may become a qualified producer as defined in 10 C.F.R. 212.78(c) on or after January 28, 1981. A qualified producer may also recover allowed expenses through the recertification or crude oil sold in the months of December 1980 and January 1981, respectively, as long as the producer has incurred, paid, and reported those expenses prior to February 28 and March 31, 1981, respectively.

46 Fed. Reg. at 12947.

The DOE thus interpreted the Executive Order as permitting crude oil sold in December and January to be certified or recertified after the date of decontrol, not only to reflect expenses incurred and paid prior to decontrol, but also with respect to expenses incurred and paid after January 28, 1981. Producers could continue to certify new tertiary projects and recover expenses incurred and paid in connection with those projects until March 31, 1981.

On March 31, 1981, the DOE issued a Final Rule abolishing most regulations. 46 Fed. Reg. 20508 (April 3, 1981). That rule noted that most provisions, including the tertiary incentive program, would become unnecessary after April 1, 1981, and accordingly with the exception of reporting requirements, the regulations were revoked as of that date.

G. *Proposed Rulemaking re: Tertiary Incentive Program*

The DOE's conclusion that expenses incurred and paid after January 27 ,1981, could be recouped through pre-decontrol sales of crude oil led to a large increase in (re) certifications under the Tertiary Incentive Program. This was recognized in an Advance Notice of Proposed Rulemaking issued by the DOE on March 17, 1981:

> [I]n the past couple of months, especially since the President's decontrol Executive Order, the amount of recoupable allowed expenses reported to [DOE] has increased phenomenally. At the same time, refiners have informed DOE that the volume of crude oil being recertified as tertiary incentive oil has increased beyond their greatest expectations.

46 Fed. Reg. 17566 (Mar. 19, 1981).[8]

The notice set forth the DOE's tentative conclusion that recoupment of expenses should be limited to those incurred and paid on or before March 19, 1981. 46 Fed. Reg. 17566 (March 19, 1981).

On April 28, 1981, the DOE issued a Notice of Proposed Rulemaking—proposing to rescind various aspects of the Tertiary Incentive Program, including (1) any allowed expenses incurred or paid after March 19, 1981; (2) in-house expenses; and (3) prepaid expenses incurred and paid after January 27, 1981. The DOE explained that the proposed rulemaking "would eliminate the abuses that may have occurred under the program without undermining the purposes of the program." 46 Fed. Reg. 25315 (May 6, 1981).

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[8] Tertiary recertifications during the three-month period from January 1, 1981 through March 31, 1981, resulted in crude oil increases totalling approximately one billion dollars—almost as large as the total for the preceding 13 months.

On July 8, 1981, following a public hearing and review of written comments, the DOE issued a Notice reporting that it had found

> no evidence to support its tentative conclusions concerning in-house allowed expenses, prepaid allowed expenses incurred or paid after January 27, 1981, or all allowed expenses incurred or paid after March 19, 1981. Rather, numerous firms in their oral and written comments demonstrated that because of the provisions permitting the recovery of these allowed expenses they have initiated EOR (enhanced oil recovery) activity that otherwise would not have been undertaken. These firms further demonstrated that the provisions proposed to be rescinded had been instrumental in the early initiation of many EOR projects. This encouragement to EOR activity should result in increased domestic crude oil production that otherwise would not have occurred. These are the precise goals ERA sought in adopting the incentive program. Also, these firms conclusively demonstrated that the retroactive nature of the two additional proposed changes would seriously impact outstanding projects, cause havoc in the industry, and divest them of funds received and spent in detrimental reliance on the then existing regulatory provisions.

46 Fed. Reg 36103 (July 13, 1981). Accordingly, the DOE decided not to adopt any of the proposals in its April 28 notice. *Id.* The agency stated that it intended to publish "a more extensive anaysis of the record and comments in the future," *id.*, but such an analysis has yet to be published.

II. *Prior Proceedings*

A. *Diamond Shamrock Corp. v. Edwards*

Prior to the DOE's July, 1981 decision, four refiners sought a preliminary injunction in the United States District Court for the District of Delaware ordering the

DOE to cease enforcement of the Entitlements Program and the Tertiary Incentive Program. After expedited briefing and argument, the court denied preliminary injunctive relief, holding that the plaintiffs had failed to show irreparable injury or that they were likely to prevail on the merits. *Diamond Shamrock Corp. v. Edwards*, 510 F.Supp. 1376, 1386 (D. Del. 1981). In its opinion the court focused primarily on plaintiffs allegations with respect to the Entitlements Program.

The court found "the plaintiffs' position regarding the tertiary incentive program to be somewhat stronger, but not sufficiently compelling to meet their burden of success on the merits." 510 F.Supp. at 1390. The court concluded that (1) the Executive Order simply exempted petroleum products from any further price and allocation controls and had not effect upon sales completed before January 28, 1981; (2) the Order did not expressly revoke any regulations, but instead directed the DOE to "take such action as is necessary to revoke the price and allocation regulations made necessary by this Order"; (3) by encouraging investment in tertiary recovery projects, the Ruling advances the President's avowed purpose to boost domestic production of crude oil; and (4) the Ruling protects the reliance interest of those producers who prior to decontrol had "probably made commitments based upon the expectation that they would receive front end money through the tertiary incentives program." *Id.* at 1390-91. The Court also observed that the alleged abuse of the Ruling "has been recognized by DOE and is being remedied by rulemaking which would rescind the tertiary incentive program with respect to any allowed expenses that are incurred and paid after March 19, 1981." *Id.* at 1390.[9]

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[9] The court's opinion in *Diamond Shamrock* was filed on April 7, 1981, prior to the DOE's notices of April 28, 1981 and July 13, 1981.

B. *Union Oil Company of California v. DOE*

On April 22, 1981, Union filed its complaint in the District Court for the Central District of California, challenging the validity of Ruling 1981-1. Following oral argument on cross-motions for summary judgment, the court granted Union's motion, holding that Answer 7 of the Ruling was invalid because "January 28, 1981 was the effective date of the cut-off of all these regulations." In its opinion, filed on December 9, 1981, the court found that "DOE's position contravene[d] the language and the intent of the President's Executive Order, the regulations, and the Congress." The court reasoned that the Ruling's extension of the Tertiary Incentive Program beyond the date of decontrol could not be reconciled with (1) the President's failure to include the Tertiary Incentive Program in the Order's listing of regulatory programs to be extended for a limited period after January 28, or (2) the President's announced intention to rely solely upon market forces to boost domestic production of oil.

The court held that the provision in 10 C.F.R. § 212.131 (a) (6) allowing (re)certifications to be made within two months following the month in which the crude oil is purchased is a procedural rule that merely extends the time for reporting tertiary expenses already incurred and paid. Accordingly the DOE acted unlawfully in purporting to permit crude oil based on expenses incurred or paid after January 27, 1981.

C. *Tosco Corporation v. DOE*

Following a hearing on December 14, 1981, the District Court for the District of Nevada, in a memorandum decision and order filed on February 10, 1982, upheld the validity of Ruling 1981-1 and unvalidated the "in-house" amendment.

1. *Ruling 1981-1*

The district court held that Ruling 1981-1 was an interpretative rule and applied well established standards

of deference in determining that the Ruling properly interpreted the regulations and the Executive Order. Contrary to the holding in *Union Oil*, the court concluded that the Executive Order did not terminate the Tertiary Incentive Program on January 28, 1981. Rather the court agreed with the holding in *Diamond Shamrock* (510 F.Supp. at 1390):

> Moreover, [the Executive Order] did not revoke any validly promulgated regulations but instead, directed DOE to "take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order." Thus, the regulations allowing retroactive price increases in order to recoup certain expenses are still in force and because the President's Order did not apply to the oil sales before January 28, 1981, those still valid regulations would work to allow retroactive price increases.

Accordingly the court held that the ruling permitting continued application of the tertiary incentive regulations to crude oil sales occurring prior to decontrol was neither erroneous nor arbitrary and capricious.

2. *In House Amendment*

The District court found that "DOE has failed to sustain its burden of showing that its making the 'in house' expense amendment effective immediately upon publication of the final rule was justified under an exception to the 30-day wait required by 5 U.S.C. § 533(d)." Accordingly the court held "that said action was unlawful as being done without observance of procedure required by law. 5 U.S.C. § 706(2)(D); see also § 211(d)(1) of 12 U.S.C. § 1904 note."

III. *Contentions on Appeal*

In Appeals No. 9-60 and No. 9-61, Union Oil and Tosco contend that Ruling 1981-1 in invalid. Their reasons may be summarized as follows: (1) Executive Order 12287

terminated the Tertiary Incentive Program; (2) extension of the Program beyond the rate of decontrol violated the intent of Congress and exceeded the Agency's statutory authority; (3) the Program permitted recovery of expenses only through the sale of current production; and (4) the DOE's extension of the Program was arbitrary, capricious, and unlawful.

In Appeal No. 9-63, the DOE contends that the court erred in holding the "in-house" amendment invalid; that the amendment "relieved a restriction" and "good cause existed for making the amendment effective upon publication"; and that even assuming noncompliance with the Administrative Procedure Act, the proper remedy would be to postpone the effective date for 30 days.

In No. 9-64, Tosco seeks injunctive relief under Section 211 of the Economic Stabilization Act and requests this court to provide comprehensive relief for all parties injured by agency action found unlawful, by determining the amount of excess payments each crude oil producer received and pro-rate distribution to refiner-participants in the Entitlements Program.

Amicus Curiae Marathon Oil Company [10] contends that all of the appeals should be dismissed as moot because of the expiration of the Emergency Petroleum Allocation Act on September 30, 1981.

IV. *Suggestion of Mootness*

Marathon contends that these actions are now moot because the DOE's power to grant the types of relief requested expired on September 30, 1981, pursuant to 15 U.S.C. § 760g.[11] Marathon argues that the "savings

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[10] *Amici curiae* briefs have been filed by 27 companies in support of or in opposition to positions taken by the various parties.

[11] 15 U.S.C. § 760g provides in pertinent part: "The authority to promulgate and amend any regulation or to issue any order under this chapter shall expire at midnight September 30, 1981, but such

clause" in § 760g (see note 11) preserves only the DOE's power to bring "enforcement" proceedings. Because the issuance of Entitlement Notices would not constitute enforcement proceedings, it argues that the DOE is now precluded from issuing the "clean-up" notices or the notice for January, 1981. Marathon contends further that even though any relief for Union or Tosco might not involve the issuance of Entitlement Notices, it would "involve the issuance of other orders by DOE and, very likely amendment of its EPAA regulations—perhaps even regulations DOE has previously revoked pursuant to the Decontrol Order."

In a memorandum opposing Marathon's motion to file a brief as *amicus curiae*, Union agrees with Marathon that the DOE now lacks the power to issue the remaining Entitlement Notices, but contends that the DOE's continuing enforcement authority gives it the power to collect excess charges from crude oil producers and to refund them to the customers who were overcharged. In support of this contention Union cites this court's recent opinion in *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 723 (TECA 1982) where the court, in a case decided after the EPAA expired, held that "the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." [12]

We agree with Union that the DOE's enforcement authority carries with it the power to collect tertiary overcharges and disburse refunds, whether or not it may issue

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expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date."

[12] Union notes also that Marathon did not seek to raise the issue of mootness by intervening or appearing *amicus curiae* in either of the district courts.

further entitlement notices.[13] It is clear also that the appeals involve a live and continuing dispute between Union and Tosco, on the one hand, and the DOE on the other. The appeals involve a "substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality" to warrant a prompt resolution of the controversy. See *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974).[14] We reject Marathon's suggestion of mootness.

V. *Validity of Ruling 1981-1*

A. *Deference to the DOE's Interpretation*

These cases involve the deference due the DOE's interpretation of a statute, executive order, and regulations. As the Supreme Court stated in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), the courts show "great deference to the interpretation given [a] statute by the officers or agency charged with its administration;" and "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." Similar deference is shown an agency interpretation of an executive order. *University of Southern Cal.* v. *Cost of Living Council*, 472 F.2d 1065, 1068 (TECA 1972), *cert. denied*, 410 U.S. 928 (1973).

As this court held in *Energy Consumers and Producers Ass'n* v. *DOE*, 632 F.2d 129 (TECA), *cert. denied*, 449 U.S. 832 (1980), an agency's ruling will be upheld if it "was a reasonable choice of possible interpretations by

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[13] It is unnecessary to determine whether the "savings clause" in § 760g preserves the DOE's power to issue the remaining Entitlement Notices. Moreover, that issue has been squarely presented in a number of pending cases, including *Marathon Oil Co.* v. *DOE*, C.A. No. C 81-634 (N.D. Ohio); *Diamond Shamrock Corp.* v. *Edwards*, C.A. No. 81-101 (D. Del.); *Mobil Oil Corp.* v. *DOE*, 81-CV-340 (N.D. N.Y.).

[14] While *McCorkle* was an action for declaratory judgment, we find the same principle applicable here.

the responsible agency. It is not required that the interpretation be the only reasonable choice. . . . In the absence of exceptional adverse circumstances this court should defer to a reasonable exercise expertise expressed in an interpretation rule by an administrative agency." *Id.* at 143. See also *Pennzoil Company* v. *DOE*, 680 F.2d 156 (TECA 1982).[15]

B. *Did Executive Order Terminate the Tertiary Program?*

The district court in Union concluded that "The plain language of the President's Executive Order indicates that all oil price controls minus those expressly excepted,[16] were to be terminated on January 28, 1981." In urging affirmance of this holding, Union and Tosco, as well as *amici* supporting their position, argue that the regulations constituting the Tertiary Program were unquestionably an element of the crude oil price controls whose operation was terminated on January 27, so that "upon issuance of the Executive Order, DOE no longer had authority to extend any aspect of the crude oil program, including the Tertiary Program." Appellant Tosco Brief, No. 9-61, pages 14-15.

The DOE and supporting *amici* contend that the Executive Order did not *revoke* any regulations, but rather *prospectively exempted* crude oil from "price and allocation controls" and directed the Secretary to "take

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[15] These general principles will be considered in more detail in their application to the DOE's interpretation of the statute, executive order and pertinent regulations.

[16] The Executive Order specifically preserved all reporting and recordkeeping requirements (Section 2(a)), three programs governing the allocation of middle distillates and Canadian crude oil (Sections 2(b), 2(c), and 2(e)), allocation orders previously issued under the "Buy-Sell" program (Section 2(d)), and the Entitlements Program (Section 3). 46 Fed. Reg. 9909 (Jan. 30, 1981) (R. 1214).

such action as is necessary to revoke the price and allocation regulations made unnecessary by this order." [17] The DOE argues that "The only effect of the Executive Order on [the] regulatory scheme was that, with the lifting of price controls as of January 28, and consequently, the elimination of price-controlled oil thereafter, January 27, 1981 became the last day on which a producer could have produced and sold price controlled crude oil." [18] Because the Order was effective "immediately," not retroactively, it did not affect the regulations governing prices charged in crude oil sales prior to decontrol. This would include §§ 212.78 and 212.131(a)(6), *supra*, permitting a producer at any time during the two-month period following a particular month in which it produced and sold crude oil to recover a portion of allowed tertiary expenses. The DOE reasons that with the elimination of price controls as of January 28, January 27 became the last day on which a producer could have produced and sold price controlled crude oil. March 31, 1981—the close of the two-month certification period—became the last day on which a producer could certify price-controlled crude oil as tertiary incentive crude oil. At that point all of the crude oil price regulations became "unnecessary" under the Executive Order, and their substantive provisions were revoked as of that date. 46 Fed. Reg. 20508 (April 3, 1981).

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[17] As noted above, this was the conclusion of the court in *Diamond Shamrock* v. *Edwards*, *supra*, and the district court in Tosco (No. 9-61). The court in *Diamond Shamrock* found that "The Executive Order simply exempted petroleum products from any further price and allocation controls and had no effect upon sales completed before January 28, 1981."

[18] Similarly, *Amici* Atlantic Richfield Company, Gulf Oil Corporation and Chevron U.S.A. Inc., argue that "By the plain meaning of the Executive Order, only crude oil sold *after* January 27, 1981 was expressly 'exempted' from the 'price and allocation controls'." *Amici* Brief, pg. 5. "The Order plainly had no effect on crude oil sold *before* January 28, 1981." *Amici* Brief, pg. 3.

With respect to the enumerated exceptions (see note 16 *supra*), the DOE argues that these programs imposed price and allocation controls on crude oil and petroleum products *after* the date of decontrol. Accordingly, it was necessary specifically to remove those programs from the effect of the order. By contrast, the tertiary incentive regulations were concerned with crude oil sold *prior* to January 28, after which there was no price-controlled crude.

When the Executive Order was issued the tertiary incentive regulations applied to controlled oil sold in December, 1980 and January, 1981. The Secretary considered these regulations, as they applied to this controlled oil, to be necessary. Produces and refiners had planned substantial tertiary projects prior to January 28, 1981, on the basis of projected recoveries of allowed expenses under the Tertiary Incentive Program. We find merit in the contention of the DOE and supporting *amici* that the retroactive termination of the tertiary incentive regulations would have the adverse effect of reducing incentives to domestic production and interrupting extensive tertiary planning in direct contravention of the policies underlying the Executive Order, which was not intended to affect the application of the pricing regulations on sales occurring prior to the date of the Order. We agree with the court in *Diamond Shamrock* that the interpretation of the DOE is in accord with the language of the Executive Order, and that

> The allowance of retroactive price increases will still serve the original purpose of the tertiary incentives program and will even advance the purposes of the President's decontrol Order. It will encourage production by encouraging investment in tertiary recovery projects.

510 F.Supp. at 1390.

We conclude that the DOE's interpretation of the Executive Order is a reasonable one: that the Order did not

terminate the tertiary incentive regulations and affected only crude oil sold *after* January 27, 1981. Crude oil sold after that date was expressly "*exempted*" from the "price and allocation controls." The order expressly delegated to the Secretary the responsibility of taking action to *revoke* unnecessary regulations and to adopt regulations and take action "necessary to implement this Order." We agree with the DOE that sales before January 28, 1981 were still subject to the regulations, "even if aspects of the transaction took place at a later time." [19]

C. *Was Ruling 1981-1 Within the Statutory Authority of the EPAA?*

Union, Tosco, and supporting *amici* contend that the DOE's extension of the Tertiary Incentive program beyond the date of decontrol was in violation of the intent of Congress as expressed in EPAA section 8(j)(1)(A), 15 U.S.C. § 757(j)(1)(A) (added by ECPA § 122(9)). Pub. L. No. 94-358, 90 Stat. 1125, 1134 (1976). The district court in *Union* found that "Both the floor debates and the Conference Report on the legislation make clear that Congress' purpose was limited to *correcting the disincentive to* tertiary production that had inadvertently been created by the then existing price controls." It is contended that in continuing the Tertiary Incentive Program to provide incentives during the period *after*

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[19] The DOE notes also that "The President chose not to revoke the regulation but rather to follow the previously established method of implementing decontrol by product exemption from regulations which continued in effect." Appended to the *amicus* brief of Mitchell Energy & Development Corp., Superior Oil Company and Ravenna Oil Company are exhibits indicating that the DOE and the Office of the President had cooperated in the drafting of the Executive Order and that the DOE gave the Office of Management and Budget advance notice of the proposal to issue Ruling 1981-1.

decontrol has been accomplished, the DOE exceeded the scope of its legislative mandate.[20]

The DOE argues that in light of the fact that the Ruling merely interpreted the Executive Order, plaintiffs' argument "is actually that the President lacked the statutory authority to decontrol in the manner chosen in the executive order, as interpreted by Ruling 1981-1." The DOE argues further that the President did not exceed the scope of his mandate because the legislative history shows that Congress' dominant purpose was to increase domestic crude oil production by encouraging investment in costly, high-risk tertiary techniques and that it directed the President to provide incentives *by means of*, rather than merely *because of*, the pricing regulations.

Amici Atlantic Richfield Company, *et al.* (ARCO) argue that it is unnecessary to consider the legislative history[21] since the statutory language is "clear and unambiguous on its face."[22] Section 8(j)(1)(A) authorizes amendments to price control regulations for the express purpose of "provid[ing] additional price incentives for bona fide tertiary enhanced recovery techniques. . . ." 15 U.S.C.

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[20] The district court in Union did not expressly determine that Ruling 1981-1 was in excess of statutory authority, but rather found it "inconsistent with Congressional intent." Conclusions of Law 14 and 19. On the other hand, the court in *Diamond Shamrock* concluded: "The allowance of retroactive price increases will still serve the original purpose of the tertiary incentives program and will even advance the purposes of the President's decontrol Order. It will encourage production by encouraging investment in tertiary recovery projects." 510 F. Supp. at 1390.

[21] The district court in Union and both sides on appeal quote extensively from selective portions of the legislative history. Plausible arguments are made for the different interpretations for which the respective parties contend.

[22] "[W]here the language of the enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *Church of Scientology* v. *Department of Justice*, 612 F.2d 417, 421 (9 Cir. 1979).

§ 757(j)(1)(A). ARCO argues that by stating that the Executive Order was intended to permit recoupment of allowed tertiary expenses paid during the normal two-month recertification period with respect to crude oil sold before decontrol, the Ruling clearly provided an incentive for the earlier initiation of enhanced recovery projects. The Ruling was thus consistent with the plain meaning of the tertiary incentive provisions of the EPAA.

The DOE also notes that when it came to the Agency's attention after decontrol that the regulations might no longer be serving their intended purpose, the agency instituted a rulemaking proceeding proposing to revoke the regulations. As noted above, the DOE determined at the conclusion of the proceedings that the provisions of the regulations had in fact encouraged tertiary activity which should result in increased domestic crude oil production that otherwise would not have occurred, so that the precise goals of the program continued to be achieved. 46 Fed. Reg. 36103 (July 13, 1981).

We conclude that Rule 1981-1 was within the statutory authority of the EPAA and was consistent with the intent of Congress in adopting the tertiary incentive provision of the Act. By allowing tertiary expenses paid and reported between January 28 and March 31, 1981, to be recouped by releasing pre-decontrol oil to market prices, the Executive Order as interpreted by Ruling 1981-1 provided additional price incentives for tertiary projects. The Executive Order thus interpreted was consistent with the EPAA purpose of providing "additional price incentives for bona fide enhanced recovery techniques."

D. *Interpretation of Regulations*

1. *Current Production*

Union and Tosco contend that even assuming *arguendo* that the Executive Order did not terminate the Tertiary Program, the use of production sold prior to decontrol to recover subsequent expenses would still be unlawful under

the provisions of the Tertiary Program itself. They argue that the Program permitted the recovery of expenses only through the sale of "current" crude oil production at market price and that even if producers could lawfully recoup expenses incurred or paid after January 27, 1981, they could recover such expenses only through sales of crude oil produced after January 27. Such production, of course, was permitted to be sold at market prices as a result of decontrol.

In effect Union and Tosco question the DOE's interpretation of its *regulations* permitting producers to reach back in time for two months as long as they had met the "conditions precedent" for recoupment of expenses. The DOE contends that 10 C.F.R. § 212.78 operated together with § 212.131(a)(6) to implement the Tertiary Incentive Program, pointing out that Section 212.78(a)(2) and (c) allowed qualified producers to incur and pay expenses and recover a portion of those expenses by charging market-level prices for otherwise price controlled crude oil. Section 212.131(a)(6) (see note 2, *supra*) allowed a producer two months after the month of sale of price-controlled crude oil to certify or recertify that crude oil to its purchasers. Thus, argues the DOE, if a producer had incurred, paid and reported allowed expenses within that period, all conditions precedent had been met for recoupment, and a producer could include his recoupment in the final price determination.

The district court in Tosco accepted the DOE's interpretation, stating that

> [Ruling 1981-1] correctly stated that, absent the Executive Order, a producer who incurred and paid Tertiary recovery expenses prior to February 28, 1981, and March 31, 1981, could have recouped those expenses through the recertification of crude oil it had sold in the months of December 1980 and January 1981, respectively.

Memorandum Decision, p. 10.

The district court in Union concluded that Ruling 1981-1 was inconsistent with the provisions of the tertiary incentive regulations. The court found the DOE's interpretation erroneous because of "its confusion over the operation of the two-month reporting period" and its assumption "that the two-month period allowed extended time for a producer *both* to recertify previous oil sales *and* to incur new expenditures." In the opinion of the court the regulations (10 C.F.R. §§ 212.78(a), 212.131(a)) "clearly indicate that the two-month period pertains *only* to the recertification process" and "does not govern the timing of the expenditure." Memodandum Decision, pg. 12.[28]

In support of their contention that the Tertiary Incentive Program did not permit recovery of expenses for crude oil sold prior to January 27, 1981, Union and Tosco rely heavily on the use of the term "current production" in the preamble to the rules relating to the Program. When the agency first proposed the Tertiary Incentive Program, the preamble stated that under the program a producer could release

> some current crude oil production . . . to return some but not all of the expenditures in the current period. For example, we might allow in 1 month or quarterly period the release of a number of barrels of current crude oil production to a price sufficient to permit the recovery of some percentage (e.g., 50 per-

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[28] The court, however, based its conclusion upon the wrong subpart of the regulation, i.e., § 212.78(a)(1), which applies only to crude oil produced from the tertiary project itself. The applicable regulation designated "Tertiary incentive crude oil" § 212.78(a)(2) reads: "Notwithstanding the provisions of § 212.73(a) beginning January 1, 1980, first sales of crude oil by or for the behalf of a producer are not subject to the ceiling price limitations of this Subpart, provided that the teritary incentive revenue from such sales does not exceed the recoupable allowed expenses attributable to that producer."

cent) of the incremental tertiary expenditures made in that period or a prior period.

43 Fed. Reg. 33679, 33685 (Aug. 1, 1978).

In the preamble to the final rule, the DOE stated that expenses could be recouped "through charging market prices for current crude oil production." 44 Fed. Reg. 51148, 51149 (Aug. 30, 1979).

The DOE maintains that it first coined the term "current production" in an effort to distinguish tertiary *incentive* production from tertiary *incremental* production under 10 C.F.R. § 212.78(a). In its initial proposal for additional price incentives for tertiary recovery techniques, the agency described the phrase "current production" as production occurring "prior to actual production resulting from the tertiary recovery project" and as "pretertiary production". In this way, argues the DOE, it distinguished "current production" from "incremental production", which referred to the increase in production resulting from such a project, 42 Fed. Reg. 2646, 2655 (Jan. 12, 1977). This was confirmed in a later rulemaking in which the agency described its general proposal for what eventually became the tertiary incentive program as allowing "a limited category of tertiary projects requiring substantial initial investment and involving high risks to receive higher prices for some amounts of pretertiary or 'current' production. . . ." 43 Fed. Reg. 33679, 33685 (August 1, 1978). The DOE argues further that Union's contention that "current production" must be construed in a restrictive manner runs counter to the agency's prior statements which manifest its consistent interpretation of the regulations "so as to encourage the increased utilization of tertiary recovery techniques."

2. *Were Answers #5 and #7 Inconsistent?*

The district court in Union found Answers #5 and #7 in Ruling 1981-1 inconsistent because Answer #5 required qualification for certification before decontrol,

whereas Answer # 7 permits qualification *after* decontrol. The Tosco court, however, concluded that Answer #5 simply "asserted that crude oil sold during the months of December 1980 and January 1981 which would have qualified for recertification in the absence of the Executive Order, could still be recertified (from price-controlled price to market price) as Tertiary Incentive Program Oil." The court recognized that under Answer #7 "a firm could qualify under the Tertiary Incentive Program after June 28, 1981, and then recertify oil it had sold during December and January, so long as the Tertiary expenses were incurred, paid and reported prior to February 28, 1981 and March 31, 1981, respectively.

While Answer #5 discusses the certification process generally, Answer #7 specifically relates to recertification based upon tertiary expenses incurred and paid *after* decontrol. Moreover, Answer #5 refers not only to tertiary incentive crude oil but to all types of oil subject to possible recertification, e.g., stripper, newly discovered, etc. Except for tertiary incentive crude oil, all other types qualified for upper tier or market prices at the time they were sold because the qualification was based on the special nature of the crude oil or the property where it was produced. On the other hand, the payment of expenses for tertiary projects, which qualified crude oil for recertification as tertiary incentive oil, usually took place after the sale of the oil involved. We find no inconsistency in Answers #5 and #7.

3. *Deference*

As noted above, an agency interpretation should be upheld if it is a reasonable construction. It need not be the *only* reasonable choice. Ruling 1981-1 was issued 15 days after the issuance of Executive Order 12287 to provide immediate guidance in response to questions submitted to the agency concerning the effect of decontrol on various regulatory programs. The ruling interpreted existing reg-

ulations in the light of the Executive Order.[24] We conclude that the agency reasonably interpreted § 212.78(a)(2) as permitting tertiary expenses to be recouped through sales of *any* crude oil subject to (re)certification under § 212.131(a)(6).[25] Applying the well established "great deference" standard to the circumstance of this case, we agree with the *Diamond Shamrock* and *Tosco* courts that Ruling 1981-1 properly interpreted the regulations and Executive Order.

VI. *The In-House Expense Amendment*

As noted above, the in-house expense amendment to permit recovery of expenses incurred between affiliated entities was made effective upon publication of the final rule. The district court in Tosco held the rule invalid by reason of the DOE's failure to sustain its burden of showing that this was justified under an exception to the 30-day wait period required by 5 U.S.C. § 553(d).[26] The DOE claims that the amendment satisfied two of the exceptions to § 553(d), i.e., it "relieve[d] a restriction" and was "for good cause found and published with the rule."

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[24] Moreover, as set forth in Note 19, *supra*, the DOE and Office of the President had cooperated in the drafting of the Executive Order and the DOE gave the Office of Management and Budget advance notice of the proposal to issue Ruling 1981-1.

[25] We note that § 212.78(a)(2) does not itself contain the words "current production" or any other language purporting to limit recoupment to sales occurring at a particular time.

[26] 5 U.S.C. § 553(d) reads:

> The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
>
> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule.

A. *Purpose of 5 U.S.C. § 553 (d)*

As the court noted in *Nance* v. *Environmental Protection Agency*, 645 F.2d 701, 708-09 (9 Cir. 1981):

> The legislative history of 5 U.S.C. § 553(d) indicates that the primary purpose of the provision was not to encourage republication dialogue, but rather to permit petitions for reconsideration and "to 'afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take other action which the issuance may prompt.'" *United States* v. *Gavrilovic*, 551 F.2d 1099, 1104 (8 Cir. 1977) (*quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 15 (1946)).

The DOE contends, and we agree, that the district court apparently based its decisions on factors applicable to 5 U.S.C. § 553(b), which requires notice and opportunity for comment prior to the adoption of the rules, rather than § 553(d), which requires publication of rules at least 30 days before the effective date.[27] There is no contention that the DOE did not comply with § 553(b). It published notice of its proposed in-house expense amendment and provided an opportunity for written comments and a public hearing. 45 Fed. Reg. 54688 (August 15, 1980). All interested parties, including Tosco, had an opportunity to participate in the rulemaking process before the amendment was adopted.[28]

B. *Did In-House Amendment Relieve a Restriction?*

Prior to January 5, 1981, a producer was restricted in the expenses recoupable under the Tertiary Incentive Pro-

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[27] As noted in *United States* v. *Gavrilovic*, 551 F.2d 1099, 1104 n.9 (8 Cir. 1977), many "cases seemingly confuse the functions of § 553(b) and (c) ["prepublication dialogue between the public and the agency"] with that of § 553(d) and (e)."

[28] 27 firms participated in the rulemaking process, and none opposed the proposed amendment. Tosco did not participate.

gram to those "incurred in arms-length transactions and for fair market value." 10 C.F.R. § 212.78(c) (1980). The DOE in its Notice of Proposed Rulemaking proposed to "modify several of the limitations that apply to the recovery of allowed expenses." 45 Fed. Reg. 54688 (August 15, 1980). The final rule amended the definition of "recoupable allowed expenses" to include expenses which were "incurred in arms-length transactions or do not exceed the price that the producers would have paid in an arms-length transaction." 46 Fed. Reg. 1246, 1248 (January 5, 1980).

Tosco argues that the "relief of restriction" exception should be narrowly construed in order to maximize the two-fold purpose which the 30-day wait period is designed to serve: (1) to ensure that the agency has an opportunity "to correct any error or oversight in regulations before, rather than after, they become effective,"[29] and thus give administrative agencies "another opportunity to correct mistakes or inadvertencies" by reconsidering a rule publication; and (2) to "afford persons affected a reasonable time to prepare for the effective date of a rule or to take any other action which the issuance of rules may prompt."[30]

Tosco contends that because refiners and purchasers of crude oil were adversely affected by the amendment, they were entitled to 30 days advance notice so they could attempt to persuade the DOE to rescind the rule before it became effective and adjust their behavior so as to minimize the rule's adverse impact upon them (*e.g.*, by purchasing crude oil from purchasers not engaging in tertiary projects or by reducing the total amount of their crude oil purchases).

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[29] Senate Judiciary Committee Print (June 1945) at 10, reprinted in Legislative History of the Administrative Procedure Act at 20, S. Doc. No. 248, 79th Cong., 2d Sess. (1946).

[30] APA Legislative History at 201.

The DOE contends that "Both in form and substance, this amendment granted an exemption *and* relieved a restriction." The restriction of "recoupable allowed ex-expenses" to those incurred in arms-length transactions "was lifted and replaced with a less restrictive definition" which would permit a producer to recover also the expense of an in-house goods or service if that cost were no greater than would be paid to an outside source for the same goods or service. 46 Fed. Reg. 1246, 1248. The DOE argues further that "even if producers were able to raise their prices as a result of the Amendment, the Amendment must in any event be upheld because it merely granted a further exemption from price controls."

The DOE also argues that the rulemaking record supports its conclusion that the in-house expenses amendment would actually benefit, not harm, refiners and other purchasers of crude oil. At the hearing on the proposed rulemaking, there was no evidence that producers would utilize the amendment to recoup expenses that would not otherwise have been incurred in arms-length transactions. The DOE therefore concluded that the amendment would actually *reduce* the amount of tertiary expenses incurred and thus *reduce* the amount of expenses recovered under the Tertiary Incentive Program, because tertiary producers could probably obtain goods and services from their affiliates at lower prices than they could from unaffiliated producers.

We conclude that the in-house amendment should be deemed to "relieve a restriction" within the provisions of § 553(d)(1). We find Tosco's argument that the amendment resulted in a significant burden upon refiners unconvincing for two reasons: first, the rulemaking record indicated that the alleged burden would be nonexistent;[31]

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[31] Tosco is precluded from collaterally attacking the record by reason of its failure to participate in the rulemaking. *Environmental Defense Fund* v. *EPA*, 598 F.2d 62, 91 (D.C. Cir. 1978); *Nader* v. *NRC*, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975).

and, second, the alleged burden (higher prices for certain quantities of domestic crude oil) is the result of market forces and not the product of obligations imposed by the regulatory scheme. The amendment merely increased the amount of crude oil exempt from mandatory price ceilings.

Having concluded that the in-house amendment "relived a restriction", it is unnecessary to rule upon the DOE's second contention that the amendment was "for good cause found and published with the rule."

VII. *Motion for Comprehensive Injunctive Relief*

Tosco seeks injunctive relief pursuant to § 211(e)(2) of the Economic Stabilization Act (ESA), as amended, 12 U.S.C. § 1904 note, and Rule 15(a) of the General Rules of this court, to implement on an industry-wide basis (1) the relief that the district court granted Tosco with respect to certifications based on in-house expenses, and (2) the relief that Tosco sought but was denied with respect to post-decontrol expenses.

In view of our holdings that both Ruling 1981-1 and the in-house amendment are valid, it is unnecessary to consider Tosco's motion; and the motion is denied.

VIII. *Conclusion*

These cases present a number of close questions. In their resolution we have recognized the "great deference" due an agency's interpretation of an applicable statute, executive order and its own regulations. We have recognized also that an agency ruling must be upheld if it is a "reasonable" choice of possible interpretations. We conclude that (1) Executive Order 12287 did not terminate the Tertiary Incentive Program; (2) the extension of the Program beyond the date of decontrol did not violate the intent of Congress and did not exceed the Agency's statutory authority under the EPAA; (3) Ruling 1981-1 was

a reasonable interpretation of the Executive Order and the Agency's own regulations and accordingly is valid; and (4) the in-house amendment relieved a restriction within the meaning of § 553(d)(1) and is valid.

We reverse the district court in *Union Oil Company of California v. DOE, et al.* (Appeal No. 9-60). We affirm the holding in *Tosco Corporation* v. *DOE, et al.* (Appeal No. 9-61) that Ruling 1981-1 is valid and reverse the court's holding (Appeal No. 9-63) that the in-house amendment is invalid. We deny the motion of Tosco Corporation for injunctive relief (Appeal No. 9-64).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 81-1961

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants.

[Filed January 26, 1982]

Decided: September 30, 1981

OPINION

HATTER, District Judge:

Union Oil seeks to have Department of Energy (DOE) Ruling 1981-1 of February 19, 1981, declared unlawful. That ruling was made in the wake of President Reagan's Executive Order of January 28, 1981, which ended price controls on domestic crude oil. Union claims the ruling is unlawful because it extended incentives available for the recovery of tertiary oil beyond this cutoff date. Because of the complexity of this issue some discussion of the background and history of crude oil price controls and the tertiary incentive program is necessary.

I

FACTUAL BACKGROUND

In 1973, Congress enacted the Emergency Petroleum Allocation Act, which imposed price controls on most of the crude oil produced in this country. Imported oil was not covered by this Act and could be sold at market prices.

After the 1973 Arab Oil Embargo, the market price of imported crude rose dramatically. Prices for controlled domestic oil, on the other hand, remained relatively stable. Refiners whose primary source of supply was imported crude were placed at a competitive disadvantage.

To rectify this problem, the Federal Energy Administration (FEA and predecessor to the Department of Energy) enacted a system of regulations known as "the entitlements program". (See 10 C.F.R. § 211.67 (1981).) One entitlement gave a refiner the right to purchase one barrel of cheaper domestic crude oil. The number of entitlements issued was determined as follows. The FEA computed the percentage of controlled domestic crude oil in the market for each month. A refiner's monthly production was then multiplied by this percentage to arrive at the number of entitlements it should receive.

For example, assume the market consisted of 40% domestic controlled crude. If a refiner processed 1,000,000 barrels of oil under such market conditions, it would be allocated 400,000 entitlements. Thus, each refiner received a number of entitlements equal to its imputed *pro rata* share of the domestic crude market.

The entitlements program then equalized pricing disparities in the following manner. Assume the refiner mentioned above (referred there as refiner A) actually purchased only 20% or 200,000 of its 1 million barrels of oil from controlled domestic sources. It would there-

fore need only 200,000 of its 400,000 entitlements. Refiner A would then sell its surplus 200,000 entitlements to refiners who were in a deficit position (i.e., those whose actual purchases of controlled oil exceeded their monthly entitlement allowance).

The money paid for these entitlements by "deficit" refiner would subsidize or reimburse Refiner A for the higher prices it paid when it had purchased a greater proportion of more expensive imported crude oil. In this way all refiners would be placed on an equal competitive footing.

Entitlement data was compiled monthly by the FEA and later by its successor DOE. Monthly entitlement notices were then published in the Federal Register. Because of the administrative lag time involved, these notices were published two months after the data had been collected. The two month lag was a recognized part of the system, and while it did create temporary inequities, these were theoretically balanced out over the long haul. *See generally Diamond Shamrock Corp. v. Edwards*, 510 F.Supp. 1376, 1379-80 (D. Del. 1981).

A. *The Tertiary Incentive Program*

In 1976, Congress recognized the need to give domestic oil producers greater incentives in order to reduce this nation's dependence on imported oil. Of particular concern was the recovery of petroleum which could only be extracted by "tertiary" or enhanced oil recovery (EOR) techniques. These included the injection of hydrocarbons, steam, alkalines, or displacement by miscible fluids, or non-hydrocarbon gas. 10 C.F.R. § 212.78(d) (1981). Congress, therefore, amended the Emergency Petroleum Allocation Act to permit additional incentives for tertiary oil. Energy Conservation and Production Act, § 122, Pub. L. No. 94-385, adding EPAA § 8(j)(1)(A) (codified at 15 U.S.C. § 757(j)(1)(A) (1976)). The Department of Energy then enacted a series of regulations which en-

abled tertiary producers to sell their oil at prevailing market prices. See 10 C.F.R. § 212.78 (1981); 42 Fed. Reg. 2647 (1977).

As originally structured, this exemption from price controls only applied to the sale of tertiary oil *after* it had been produced by one of the enhanced recovery techniques. It did not help crude oil producers who wanted to initiate *new* tertiary projects, but who lacked the capital to overcome prohibitively high start-up costs. Until tertiary oil could be produced and sold, no benefits could be derived under this program.

The Department of Energy remedied this situation by allowing a potential tertiary producer to reclassify or recertify its *other* sales of price-controlled domestic crude as tertiary oil. This could be done *at the time* the producer incurred additional expenses from the use of advanced recovery techniques. This reclassified oil could then be sold at higher prevailing market prices. The producer, thus, recouped most of his or her advanced recovery expenses as they were incurred. 44. Fed Reg. 51148-49 (1979).[1]

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[1] Under this program a producer could recoup 75% of its advanced recovery expenses or a maximum of $20,000,000 on each project. 10 C.F.R. § 212.78(c) (1981). A sufficient quantity of price controlled oil was reclassified as tertiary until the additional revenues realized from market priced sales matched the level of expenses allowed under the regulations.

As time went on, additional incentives were allowed under the tertiary program. In June 1980, DOE amended the regulations so that a producer could deduct its Windfall Profit and *ad valorem* property taxes from its revenue figures. 45 Fed. Reg. 40106-07 (1980), *modifying*, 10 C.F.R. 212.78(c). This change had the following effect. By deducting these taxes from the total amount of revenue gained, a producer would then be able to reclassify that much more oil as decontrolled crude. For instance, assume a 70% tax rate. Also assume that a producer expended $1,000,000 in tertiary recovery projects. Under the regulations he or she could recoup $750,000 (i.e. 75% of $1,000,000). If controlled oil was selling at $10 a barrel and decontrolled oil at $60, this producer

Because large amounts of crude oil were reclassified from controlled to decontrolled oil under this program, the amount of controlled oil deemed to be in the national supply was significantly reduced. This, in turn, had a major impact on the entitlements program. With less controlled crude deemed to be in production, the overall percentage of controlled oil used to calculate the monthly allotment of entitlements dropped. As a result, refiners received a smaller share of monthly entitlements. Many, who had previously been entitlement creditors, now found themselves in a deficit position and forced to buy into the entitlement market. 46 Fed.Reg. 25315 (May 6, 1981).

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would gain $50 of additional revenue on each barrel of oil reclassified. Under the original program, the producer could reclassify a maximum of 15,000 barrels of oil in recouping tertiary expenses. (This figure is arrived at by dividing the allowable expenses ($750,000) by the revenue gained per barrel ($50)). But under the amended program this producer would only be deemed to gain a fraction of this $50 of additional revenue because of taxes paid. Seventy percent (70%) or $35 of this gain would be deemed to be consumed in taxes. Thus, the producer would only attribute $15 per barrel as additional revenue gained by recertification (i.e. $50-$35). Now it could reclassify that many more barrels of oil at $15 instead of $50. In this example, 50,000 barrels ($750,000 divided by $15), as opposed to 15,000 barrels originally, could now be reclassified. This amendment thus increased dramatically the number of barrels of oil that could be freed from price controls. At the same time it reduced the number of barrels of price-controlled crude deemed to be in production. This in turn reduced the number of monthly entitlements available to refiners.

On January 5, 1981, DOE added another category of expenses under the tertiary exemption program. These included expenditures for advanced recovery methods which were paid to "in-house" subsidiaries or affiliates. 46 Fed. Reg. 1246 (1981). In addition, DOE imposed no time limits on when tertiary projects had to actually begin. 46 Fed. Reg. 27293 (May 18, 1981). Major petroleum corporations could thus charge off "phantom" expenses paid to an affiliate for a project that might not begin for months in the future. This change also caused additional shrinkage in the number of monthly entitlements alloted.

B. *The Executive Order Ending Crude Oil Price Controls*

On January 28, 1981, President Reagan announced the immediate decontrol of domestic petroleum prices in Executive Order No. 12287. The Order stated in part that:

> All crude oil and refined petroleum products are exempted from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended. The Secretary of Energy shall promptly take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order.
>
> Notwithstanding Section 1 [above paragraph] of this Order: (a) All reporting and record-keeping requirements in effect under the Emergency Petroleum Allocation Act, as amended, shall continue in effect until eliminated or modified by the Secretary of Energy.
>
> [The Order then enumerated three specialized "subprograms" not to be immediately dismantled. They were: state set-aside for middle distillates, middle distillates for surface passenger mass transit, and the Canadian Allocation Program.]

Following the Executive Order, numerous questions arose concerning its implementation. Most of these concerned how long producers could continue to recertify price controlled oil sold immediately prior to the Executive Order. Because of the two-month lag built into the reporting system, it was possible for producers to have qualified for exemptions from price controls prior to the January 28th decontrol order, but unable to recertify their sales until some time after that date.

In response to a question regarding recertification in general, the Department of Energy replied that:

> *If crude oil would have otherwise qualified for lawful recertification . . . prior to the implementation of the*

> *Executive Order*, a producer may recertify . . . crude oil sold in the months of December 1980 and January 1981 . . . within the consecutive two-month period immediately following the month in which the sale was made.

46 Fed. Reg. 12947 (February 19, 1981) (Answer #5). Emphasis added.

But DOE changed its tune when asked specifically about tertiary incentive oil. In Answer Number 7, it noted that:

> Executive Order 12287 is intended to provide for an immediate decontrol of crude oil and refined petroleum products. The Order does not abrogate the right that accrued to a firm to establish prices for crude oil prior to January 28, 1981. *Thus, a firm may become a qualified producer . . . on or after January 28, 1981.* A qualified producer may also recover allowed expenses through the recertification of crude oil sold in the months of December, 1980 and January, 1981, respectively, as long as the producer has *incurred*, *paid*, and *reported* those expenses prior to *February 28* and *March 31, 1981.*

DOE Ruling 1981-1, 46 Fed. Reg. 12947 (1981). Emphasis added.

Under this interpretation, *new* tertiary projects could be qualified *after* January 28 as long as a producer "incurred, paid and reported" its expenses prior to the February 28 or March 31 cutoff dates. Numerous producers took advantage of this extra grace period by initiating new tertiary projects and recertifying oil that had previously been sold at controlled prices.[2]

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[2] By mid-March 1981, DOE acknowledged that during the period immediately following the President's Decontrol Order, "the amount of recoupable [tertiary] expenses reported . . . has increased phenomenally." 46 Fed. Reg. 17566 (March 19, 1981).

DOE's extension of the tertiary program had a dramatic impact on the entitlements program. Because of the increased number of recertifications allowed, a greater proportion of the overall petroleum production was reclassified as decontrolled rather than controlled oil during the last two months, or "mop-up" phase of price controls. Oil that would normally have been sold at cheaper controlled prices was retroactively marked-up to reflect a sale at higher market levels.

Refiners, particularly the smaller independents, were forced to subsidize those producers able to take advantage of this last-minute regulatory loophole. They were not allotted as many entitlements because there was less decontrolled oil deemed to be in production. Consequently, they had to pay a higher price for their oil purchases.

Union Oil, the plaintiff in this action, was one of those producers adversely affected by DOE's February 19th Ruling 1981-1. Union claims that this Ruling had the effect of extending the tertiary incentive program beyond the January 28 decontrol date and should therefore be declared unlawful.

II

ANALYSIS

The plain language of the President's Executive Order indicates that all oil price controls, minus those expressly excepted, were to be terminated on January 28, 1981. The Order provided for the "immediate and orderly decontrol of crude oil and refined petroleum products."

DOE, however, reasons that its extension is justified because the tertiary program was an *exemption* from price controls and was therefore unaffected by the President's Order. In addition, DOE argues that the Decontrol Order did not abolish the reporting and record-keeping regulations which were part of the recertification process. DOE reasons that the continued existence of the regula-

tion kept the tertiary program alive, despite the Decontrol Order. Finally, DOE contends that its continuation of the tertiary program was in keeping with the President's Executive Order because it encouraged additional domestic oil production. As will be shown below, these arguments are without merit.

A. *The Legislative History of the Tertiary Incentive Program*

Contrary to DOE's assertion, the tertiary incentive program never was intended to enjoy a separate and independent existence apart from crude oil price controls. This is made clear by the following language which appeared in the House-Senate Conference Report submitted at the time the tertiary incentive program was initiated.

> The conferees are agreed that there exists great potential for augmenting domestic crude oil production through the application of enhanced recovery techniques [i.e. tertiary methods]. There is also general agreement that current economic circumstances would permit adjustments to the pricing mechanism contained in the Energy Policy and Conservation Act to give needed additional incentives for the application of high-cost enhancement techniques which today are not economical . . . .
>
> For these reasons, the conference substitute seeks to obtain the objective of providing additional price incentives for high-cost enhancement techniques by equipping the Administrator with greater flexibility to provide for such incentives *within the framework of the existing price regulatory structure.*

S. Conf. Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976). Emphasis added. Senator Domenici expressed a similar perception of the tertiary program. He stated that:

> [W]e can delay for 10 or 15 years the recovery of any substantial quantities of oil by the secondary or

> tertiary techniques . . . . [Or w]e can leave it there and wait 10 or 15 years from now, *perhaps when there are no controls, and then the expensive techniques . . . will come into play.*

122 Cong. Rec. 18479 (June 16, 1976). Emphasis added.

Even the Department of Energy endorsed such a rationale when in 1979, it implemented one phase of the tertiary program. The Department announced that:

> This action is intended to increase domestic crude oil production through the initiation of additional projects utilizing a variety of [advanced recovery] techniques in a wide range of reservoirs. *This increased level of activity during the period of crude oil price controls,* should promote technical and commercial advances in [advanced recovery] techniques.

44 Fed. Reg. 51148-49 (Aug. 30, 1979). Emphasis added.

DOE's interpretation would allow the continued existence of a regulatory incentive program now rendered unnecessary by price decontrol. Once price controls end, the need for a system of incentives designed to counteract some of the adverse effects of those controls also ends. Under price controls, a producer had to rely on the recertification procedures to get market price revenues. Under a free market, this procedure becomes unnecessary because a producer can go directly into the market and receive the same prices.

B. *The Independent Reporting Regulations*

Another of DOE's major arguments is that the Decontrol Order did not immediately suspend or revoke any price control regulations. Two of those regulations, 10 C.F.R. § 212.78 and § 212.131, gave tertiary producers a two-month grace period in which to retroactively recertify oil previously sold at controlled prices. This two month reporting period allowed producers to recertify *any* oil

sales made prior to the January 28 cutoff date as long as tertiary expenses were incurred and the recertification reported within the two-month period *following* the Order. For these reasons DOE extended the final cutoff date for the tertiary incentive program to March 31, 1981. DOE further argues that this interpretation is necessary or else producers who qualified under the tertiary incentive program prior to January 28, but who did not attempt to recertify any oil sales until *after* that date would be forever foreclosed from doing so.

In reaching this conclusion, DOE has created a new post-decontrol right out of what amounts to an administrative reporting regulation. The regulations create the two-month delay period to make allowances for the administrative lag-time. They did not create the *right* to qualify for tertiary incentives. That right came from the substantive regulatory provisions themselves.

The organization and structure of the tertiary regulations makes this clear. 10 C.F.R. § 212.131(a) sets out the procedure for certifying various types of exempt crude oil within the two-month reporting period. *Other* regulations, however, contain the substantive rules on what types of petroleum production can qualify for a tertiary exemption. For instance, stripper well production has to qualify in accordance with 10 C.F.R. § 212.75(b). Tertiary incentive oil is governed by 10 C.F.R. § 212.78(a) which provides in part:

> [F]irst sales of incremental crude oil *resulting from the implementation or expansion of a qualified tertiary recovery project* are not subject to the ceiling price limitations of this subpart.

10 C.F.R. § 212.78(a) (1981). Emphasis added.

This regulation clearly indicates that a producer must first initiate a qualified project and incur certain expenses before he or she can recertify oil sales using the two-month reporting procedure. DOE's interpretation, on the

other hand, ignores this critical element. Instead, it focuses on when the *sale* of decontrolled oil occurred. According to DOE, sales made prior to January 28 can be recertified even if the tertiary expenditures were incurred after this time. This interpretation turns the intent of the regulations on their head. It also amounts to an unauthorized extension of a price control program beyond the date of the President's Decontrol Order.[3]

DOE's erroneous interpretation arises in part because of its confusion over the operation of the two-month reporting period. DOE apparently assumes that the two-month period allowed extended time for a producer *both* to recertify previous oil sales *and* to incur new expenditures. The regulations in question (10 C.F.R. §§ 212.78 (a), 212.131(a)), however, clearly indicate that the two-month period pertains *only* to the recertification process. It does not govern the timing of expenditures.

In both its oral and written arguments, DOE also assumed that a termination of the tertiary program as of January 28 would foreclose producers who had qualified *prior* to that date from *ever* being able to recertify their oil sales during the ensuing two-month period. But the Decontrol Order simply put an end to price controls as of January 28. If a producer had qualified for the tertiary exemption *prior to that time* he or she could still recertify sales *after* January 28 provided that the recertification occurred within the requisite two-month reporting period. DOE, in fact, reached this very same conclusion with regard to other types of oil that were eligible for various price control exemptions. 46 Fed. Reg. 12947 (Feb. 19. 1981) (Answer # 5).

Nor can DOE successfully argue that the two-month reporting regulations somehow gave the tertiary program

[3] Both DOE and the court in Diamond Shamrock v. Edwards, 510 F. Supp. 1376 (D. Del. 1981) focused on whether pre-January 26th *sales* could be recertified, regardless of whether a producer had *qualified* for a tertiary exemption prior to that time.

added life because they were unique to that program. The two-month reporting regulations were adopted independently of the tertiary incentive program and applied to all types of crude oil price control exemptions. See 10 C.F.R. §§ 212.131(a)(1)-(a)(4), 212.131(a)( ) (1981); 40 Fed. Reg. 13522-23 (1975). Thus, DOE's position that the tertiary program, and it alone, somehow survived because of these reporting regulations cannot withstand scrutiny.

DOE's position is further undermined by the plain language of the President's Executive Order. The Order stated that "[a]ll crude oil and refined petroleum products are exempted from price and allocation controls." The remainder of the Order set out three categories of petroleum that were not to be immediately affected. Tertiary incentive oil was not one of them.

C. *DOE's Argument that its Interpretation Helped Encourage Domestic Production*

DOE further argues that a continuation of the tertiary incentive program beyond January 28 was in keeping with the President's Order because it further encouraged domestic production. In reality, what DOE's ruling did was to spark a last minute stampede by oil producers eager to claim benefits under what amounted to a regulatory loophole. See *The Washington Post*, March 30, 1981, Washington Business Section, at 3, col. 2.

Under oil price control regulations as they existed just prior to the President's Order, a producer could qualify for the tertiary exemption merely by classifying *prepayments* as recoupable allowable expenses. The prepayment served to satisfy the regulatory requirements even though the actual tertiary project might not begin for years in the future. See Department of Energy Interpretation No. 1981-11, 46 Fed. Reg. 27293 (May 18, 1981). In addition, certain producers could recover "phantom" tertiary ex-

penses that were allegedly incurred in interaffiliate transactions. 46 Fed. Reg. 1246 (Jan. 5, 1981).

The result of these liberal interpretations was to allow for the recertification of tertiary oil even though actual production might not begin for years in the future. These circumstances therefore seriously undercut DOE's claim that its two-month extension encouraged domestic production. DOE even admitted as much when it expressed reservations about the two-month continuation in March 19, 1981. DOE stated that "tertiary projects which this program was designed to enhance are most likely already to have been certified and appropriate expenses incurred and paid. 46 Fed. Reg. 17566 (March 19, 1981).

By allowing recertification of new tertiary projects after January 28, 1981, DOE was allowing a select number of producers to achieve what amounted to double recovery. After January 28, with the exception of three enumerated categories, *all* oil could be sold at market prices. Therefore, a new tertiary producer was able to instantly achieve in the market place what had previously only been possible through recertification of price-controlled oil sales. But under the DOE ruling he could also claim additional revenues by recertifying other crude oil previously sold at controlled prices. Thus, a select number of producers could enjoy the best of both deregulated and regulated worlds.

On September 24, 1981, President Reagan stated in a speech to the nation that:

> [W]e don't need an energy department to solve our basic energy problem. As long as we let the forces of the market place work without undue interference, the ingenuity of consumers, business, producers, and inventors will do that for us.

Weekly Compilation of Presidential Documents, Vol. 17, no. 39, p. 1027 (Sept. 24, 1981). While this speech did not expressly refer to Rule 1981-1 of February 19, it

clearly reflects a view fundamentally at odds with the policy rationale DOE urges here.

III

The Appropriate Standard of Review

This Court is required to give substantial deference to the agency's own interpretation of its regulations, as well as to the agency's interpretation of orders and statutes which confer or limit the agency's authority. *Udall v. Tallman*, 380 U.S. 1 (1965); *Energy Consumers & Producers Ass'n. v. DOE*, 632 F.2d 129 (Em. App. 1980).

At the same time, however, judicial review is not a "rubber stamp." *E.g., NLRB v. Brown*, 360 U.S. 278, 291 (1965). It is clear that:

> [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—. . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be —(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

5 U.S.C. § 706 (1976).

"[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated . . . . The power of an administrative officer . . . is . . . only the power to adopt regulations to carry into effect the will of Congress . . . . A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity." *United States v. Larinoff*, 431 U.S. 864, 873 & n.12 (1977) (brackets omitted).

Neither the language nor intent of President Reagan's Executive Order No. 12287, the regulations, nor the history of the statute, is consistent with DOE's argument

that producers could receive benefits under the Tertiary Incentive Program for new investments made after the date of decontrol. To the contrary, DOE's position contravenes the language and the intent of the President's Executive Order, the regulations, and the Congress.

This Court has carefully reviewed the decision in *Diamond Shamrock v. Edwards*, 510 F. Supp. 1376 (1981) which upheld the DOE Ruling being challenged in this case. Although this Court found the analysis in that decision helpful, it is unclear precisely what materials and arguments were before the Delaware Court with regard to the questions at issue here. In addition, *Diamond Shamrock* involved a motion for a preliminary injunction. It is well established that decisions made on motions for preliminary injunction "are not determinative of those issues" at trial on the merits. *E.g.*, *Bursten v. Phillips*, 351 F.2d 616 (9th Cir. 1965). "Based, as they usually are, on incomplete evidence and a relatively hurried consideration of the issues, these provisional decisions should not be used outside the context in which they originally were rendered." 11 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2950, at 494-95 (1973) (footnotes omitted). For these reasons, this Court has decided not to follow the *Diamond Shamrock* decision.

The Court also wishes to make it clear that this decision has no effect on tertiary costs incurred and paid before decontrol. Producers making such investments had qualified for benefits under the Tertiary Program before it ended. The Executive Order of January 28 preserved their rights by permitting the certification or recertification of crude oil after that date. Executive Order § 2(a); 46 Fed. Reg. 12946 (Answer # 1), 12947 (Answer # 5). This conclusion is also consistent with the intent of Congress in recognizing tertiary expenses incurred and paid during the period of the price control regimen.

For the reasons set out above, plaintiff's motion for summary judgment is granted and defendants' cross motion for summary judgment is denied.

Dated: January 25, 1982

/s/ Terry J. Hatter, Jr.
Hon. TERRY J. HATTER, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 8-1961:TJH

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY and JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants.

[Filed December 8, 1981]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the extensive briefs, accompanying appendices, and other pleadings submitted by the parties, and the arguments presented by the parties at the hearing on September 30, 1981 on the cross motions for summary judgment, the Court hereby sets forth its Findings of Facts and Conclusions of Law:

FINDINGS OF FACT

1. On January 28, 1981, President Reagan issued Executive Order 12287. The Order provided for the "immediate . . . decontrol" of "[a]ll crude oil and refined petroleum products . . . ." 46 Fed. Reg. 9909 (January 30, 1981).

2. On February 12, 1981, the Department of Energy ("DOE") issued its Ruling 1981-1. 46 Fed. Reg. 12945 (February 19, 1981). The stated purpose of the ruling

was to respond to questions that DOE had received about the effect of the Executive Order on certain of the regulatory programs administered by DOE. *Id.*

3. This case was brought by the Union Oil Company of California ("Union") for relief from a portion of Ruling 1981-1 which relates to the effect of the Executive Order on a DOE regulatory program known as the Tertiary Incentive Program.

4. The challenged portion of Ruling 1981-1 is set forth in "Answer #7" of the Ruling. DOE there took the position that notwithstanding Executive Order 12287, the Tertiary Program extended until March 31, 1981, permitting crude oil producers until that date to certify new tertiary projects; to incur and pay new "recoupable" tertiary expenses; and to recoup these expenses by retroactively charging market prices for oil that had been sold at price-controlled levels before decontrol.

5. The parties agree, and the Court finds, that there is no genuine issue as to any material fact in this case, and that the issues are appropriate for resolution on Union's motion and DOE's cross motion for summary judgment.

6. Plaintiff Union is a California corporation which maintains its principal offices in Los Angeles, California. Union is engaged, *inter alia*, in the purchasing and refining of crude oil.

7. Defendant DOE is an agency of the United States organized under the provisions of the Department of Energy Organization Act and Executive Order 12009, 42 Fed. Reg. 46267 (September 15, 1977).

8. Under the Emergency Petroleum Allocation Act of 1973 ("EPAA") and other federal statutes, DOE and its predecessor agencies (referred to herein for convenience simply as "DOE") adopted and administered rules which imposed regulatory controls on the price and allocation of all crude oil and refined petroleum products. *See* 15

U.S.C. § 753(b)(i) (1976); 10 C.F.R. Parts 211, 212 (1981). Under the DOE regulations, some domestic crude oil was subject to mandatory price ceilings; other domestic crude oil, and all imported crude oil, could be sold at market prices.

9. As prices for crude oil rose beginning in 1973, the variation in price between price-controlled and uncontrolled oil became substantial. For example, in December 1980 the weighted average price of certain categories of price-controlled oil was $7.49 per barrel, while the average price for uncontrolled crude oil was $34.55. *See* 46 Fed. Reg. 14157, 14158 (February 26, 1981).

10. As a consequence of DOE's crude oil price ceilings, domestic crude oil producers were inhibited from making investments in certain high-cost, high-risk oil recovery projects known in the industry as "enhanced oil recovery" ("EOR") or "tertiary" projects. To correct this unintended regulatory disincentive, Congress in 1976 enacted amendments to the EPAA designed to allow DOE "the means of targeting additional price incentives" to tertiary projects "which are uneconomical under today's pricing regimen." S. Conf. Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976). Congress implemented its objective by directing DOE to amend its price and allocation regulations to "provide additional price incentives for bona fide tertiary enhanced recovery techniques." EPAA § 8(j)(1)(A), 15 U.S.C. § 757(j)(1)(A) (added by § 122(9) of the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976)).

11. Pursuant to this authority, DOE adopted the "Tertiary Incentive Program." 44 Fed. Reg. 51148 (August 30, 1979). Under this Program, a producer was permitted to sell otherwise price-controlled crude oil at market prices ("tertiary incentive crude oil"), until it had recouped additional net revenues amounting to 75 percent of the amount invested in a qualified tertiary project, up to $20 million per project. 10 C.F.R. § 212.78 (1981).

Before it could recoup tertiary expenses through this mechanism, a producer was first required to have "certified" the project as qualified and have made tertiary investments, *i.e.*, "incurred" and "paid" allowable expenses. *Id.* DOE intended the Program to stimulate an "increased level of [tertiary] activity, during the period of price controls . . . ." 44 Fed. Reg. 51148 (August 30, 1979).

12. The Tertiary Program permitted producers to self-certify their projects as "qualified" and their expenses as "incurred" and "paid," subject to possible DOE audit. 10 C.F.R. § 212.78(d) (1981). The regulations imposed no limit on when the "qualified" project was to be undertaken or completed; they thus permitted producers to recoup immediately any prepaid expenses, even those for goods or services not to be provided until months or years in the future. *See, e.g.*, Interpretation No. 1981-11, *Sun Oil Co.*, 46 Fed. Reg. 27293 (May 18, 1981).

13. Under the Tertiary Program as intially promulgated, expenses paid to affiliated entities could not be recovered. However, on December 29, 1980, DOE issued an amended regulation to permit producers to recover "in-house" expenses (those "incurred" and "paid" in transactions between affiliated entities) on the same basis as other expenses. 46 Fed. Reg. 1246 (January 5, 1981).

14. From the inception of crude oil price ceilings in 1973, producers have been required to "certify" to their buyers the amount and maximum lawful price of crude oil they sold. *See* 6 C.F.R. § 150.354(c)(4) (1974). Initially, the regulations did not require certification to be made within any particular time period. However, lengthy delays in certifications occasioned hardship for refiners and other purchasers of crude oil, who needed an assurance of price stability. *See* 40 Fed. Reg. 13522, 13523 (March 27, 1975); DOE Interpretation 1978-12, *Permian Corp.*, 43 Fed. Reg. 19818, 19820 (May 9, 1978).

15. Accordingly, DOE adopted a regulation effective March 23, 1975 which provided that producers would be required to certify crude oil within the two-month period following the month of sale. *See* 40 Fed. Reg. 28447 (July 7, 1975). The purpose of the regulation was to bring the time of certification as closely into line with the time of the sale as practicable. 40 Fed. Reg. at 13523. However, DOE recognized that certifications could not be effected immediately, because the lawful selling price of crude oil in the month of sale depended upon data for the entire month. *See, e.g.*, 10 C.F.R. §§ 212.54(c) (definition of "stripper well property"); 212.72 (definitions of "old" and "new crude oil"). Producers needed "adequate time to ascertain the correct categories for each sale" of crude oil. DOE Proposed Finding of Fact #4. The certification regulation applied to all categories of crude oil. When it adopted the Tertiary Incentive Program four years later, DOE simply included tertiary incentive crude oil among the categories of crude oil which were required to be certified. *See* 10 C.F.R. § 212.131(a)(4)(i); 43 Fed. Reg. 33683 (1978).

16. All certifications (and recertifications) of crude oil as uncontrolled oil (through the Tertiary Program or otherwise) directly affected the cost of crude oil to all refiners nationwide, through DOE's Entitlements Program. The operation of the Entitlements Program has been described in detail elsewhere. *E.g., Cities Service Co. v. FEA*, 529 F.2d 1016 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976); *Pasco, Inc. v. FEA*, 525 F.2d 1391 (Em. App. 1975). It is sufficient to note here that under the Entitlements Program each refiner shared approximately *pro rata* in the financial benefits of access to price controlled crude oil, through cash payments intended roughly to equalize all refiners' average crude oil costs. Certifications of price-controlled oil as uncontrolled oil under the Tertiary Program reduced the total amount of price-controlled oil available to all refiners. Thus, if producers could make tertiary investments after decontrol

and recoup them through certification or recertification of otherwise price-controlled crude oil sold prior to decontrol, the Entitlements Program would impose the increased costs on all domestic refiners.

17. On January 28, 1981, President Reagan issued Executive Order 12287, 46 Fed. Reg. 9909 (January 30, 1981). The Executive Order provided that "in order to provide for an immediate and orderly decontrol of crude oil and refined petroleum products, . . . [a]ll crude oil and refined petroleum products are exempted from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended . . ., effective immediately." *Id.* at 9910.

18. The Executive Order expressly extended certain specified DOE regulatory programs for a limited time. For example, the Order provided that "[n]otwithstanding" the general decontrol provision, the DOE "reporting and record-keeping" requirements would remain in effect. *Id.* § 2(a). The Executive Order expressly permitted DOE to issue entitlements notices for periods before the date of decontrol. *Id.* § 3. The Order also specifically provided that three other regulatory programs would remain in effect until March 31, 1981: the "State set-aside" program for middle distillates; the program of "special allocation of middle distillates for surface passenger mass transportation;" and the "Canadian Allocation Program." *Id.* §§ 2(b), (c), (e). Certain "Buy-Sell lists and orders" were also explicitly exempted from decontrol. *Id.* § 2(d). The Tertiary Program was not among the programs expressly extended by the Executive Order.

19. The Executive Order was accompanied by a Presidential Statement describing the effect of the Order. *Weekly Compilation of Presidential Documents*, vol. 17, no. 5, p. 53 (January 28, 1981). The Presidential Statement noted that under the Order "certain minor provi-

sions of the current regulatory program will not end until March 31, 1981." *Id.* at 54.

20. On February 12, 1981, DOE issued its Ruling 1981-1, 46 Fed. Reg. 12945 (February 19, 1981). In Ruling 1981-1, DOE announced, *inter alia*, that producers could continue until March 31, 1981 to certify new tertiary projects; to incur and pay new tertiary expenses for new or existing projects; and to recoup these new expenses by retroactively increasing the price of controlled oil sold before decontrol.

21. On March 19, 1981, DOE stated that "especially since the President's decontrol Executive Order . . ., the amount of recoupable allowed expenses reported . . . has increased phenomenally" and that the volume of tertiary crude oil recertified to refiners "has increased beyond their greatest expectations." 46 Fed. Reg. 17566 (March 19, 1981). Accordingly, DOE published an Advance Notice of Proposed Rulemaking proposing to rescind the Tertiary Program with respect to allowed expenses that had not been incurred and paid as of that date. *Id.*

22. On May 6, DOE published a Notice of Proposed Rulemaking as promised in the March 19 Advance Notice. 46 Fed. Reg. 25315 (May 6, 1981). In addition to proposing the March 19 cutoff, DOE stated that the failure to limit prepaid expenses under the Tertiary Program had "created a powerful incentive *merely to pay expenses* before the end of the program, even where the recoupment of 75 percent of those expenses under the program was not necessary to justify undertaking the project and would not expedite the project." *Id.* at 25316-17 (emphasis in the original). DOE also recognized that the provision permitting recoupment of "in-house" tertiary expenses paid only to affiliates "could be abused" since "the tertiary financial transactions are generally all within the same firm . . . resulting generally in a 'wash' within the firm as a whole." *Id.* at 25316. DOE accordingly also proposed to rescind the Tertiary Program with

respect to any interaffiliate expenses incurred or paid after January 4, 1981, and with respect to any prepaid allowed expenses incurred or paid after January 27, 1981.

23. On July 13, 1981, DOE published a notice stating that it did not intend to adopt any of the proposals announced in the March 19 and May 6 notices. 46 Fed. Reg. 36103 (July 13, 1981).

24. Any finding of fact erroneously designated below as a conclusion of law is hereby incorporated into these findings of fact.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the case under 28 U.S.C. § 1331; EPAA § 5(a), 15 U.S.C. § 754(a); and § 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note. Venue is proper under 28 U.S.C. § 1391(e).

2. Union challenges that portion of Ruling 1981-1 which states that producers could recoup their tertiary investments made after decontrol through retroactive increases in the price of controlled crude oil sold before decontrol. Union makes two principal arguments in support of its claim that DOE's action was unlawful. First, Union asserts that the Tertiary Program was ended by the Executive Order; it contends that the Order and the DOE price control regulations cannot sustain the interpretation given them by DOE. Second, Union argues that even if the DOE's interpretation were correct, the regulations as so construed were unlawful because they were directly contrary to the intent of Congress in providing for tertiary incentives.

3. The resolution of Union's first assertion turns on the proper interpretation of DOE's regulations and Executive Order 12287. This Court is required to give substantial deference to the agency's own interpretation of its regulations, as well as to the agency's interpretation

of orders and statutes which confer or limit the agency's authority. *Udall v. Tallman*, 380 U.S. 1 (1965); *Energy Consumers & Producers Ass'n. v. DOE*, 632 F.2d 129 (Em. App. 1980).

4. At the same time, however, judicial review is not a "rubber stamp." *E.g., NLRB v. Brown*, 380 U.S. 278, 291 (1965). It is clear that:

> [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—* * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] * * * (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

5 U.S.C. § 706 (1976).

5. The interpretation at issue here, "Answer # 7" in Ruling 1981-1, reads in its entirety as follows:

> Absent the Executive Order, a qualified producer that would have incurred, paid, and reported its allowed expenses prior to February 28 and March 31, 1981, respectively, could have recovered those expenses through the recertification of crude oil sold in the months of December 1980 and January 1981, respectively, as long as those recertifications were made within the consecutive two-month period within which such certification is permitted under 10 C.F.R. 212.131(a)(6). Executive Order 12287 is intended to provide for an immediate decontrol of crude oil and refined petroleum products. *The Order does not abrogate the right that accrued to a firm to establish prices for crude oil prior to January 28, 1981.* Thus, a firm may become a qualified producer as defined in

> 10 C.F.R. 212.78(c) on or after January 28, 1981. A qualified producer may also recover allowed expenses through the recertification of crude oil sold in the months of December 1980 and January 1981, respectively, as long as the producer has incurred, paid, and reported those expenses prior to February 28 and March 31, 1981, respectively.

46 Fed. Reg. at 12947 (emphasis added).

6. This view cannot be sustained under DOE's regulations. The regulations clearly provided that a producer had no right to recoup any tertiary expenses until after he certified the project and had incurred and paid the expenses. 10 C.F.R. § 212.78 (1981). Accordingly, a producer had no accrued right before January 28 to recoup tertiary expenses unless the producer had already incurred and paid those expenses before January 28. The contrary view set forth in Ruling 1981-1 is plainly erroneous.

7. DOE argues that the regulations establishing the Tertiary Incentive Program remained in force after decontrol on the ground that the Executive Order itself did not revoke any regulations, but instead explicitly left that task to the Secretary. DOE asserts that the unrevoked regulations had the "force and effect of law." DOE Memorandum at 25. The Court finds no merit in this contention. It ignores the language of the Order providing that all crude oil was exempted "effective immediately' from price and allocation controls. In addition, Sections 2 and of the Executive Order specified by name certain specific regulatory programs that were to be extended for a limited period after January 28, "[n]otwithstanding" the general decontrol provision. These express and detailed exceptions to the broad decontrol Order confirm the Court's conclusion that the Tertiary Program was not intended to survive the issuance of Executive Order 12287.

8. The evident purpose of decontrol was to subject the petroleum industry to the marketplace. The Order con-

templated that business decisions after January 28 would be made on the basis of economic merit, not on account of regulatory constraints or preferences. The President intended that business transactions after decontrol would be free of regulatory consequences.

9. On September 24, 1981, the President stated in a speech to the nation that:

> [W]e don't need an energy department to solve our basic energy problem. As long as we let the forces of the marketplace work without undue interference, the ingenuity of consumers, business, producers, and inventors will do that for us.

Weekly Compilation of Presidential Documents, Vol. 17, no. 39, p. 1027 (September 24, 1981).

Although this speech did not expressly refer to the President's Executive Order 12287, it clearly reflects a view fundamentally at odds with the interpretation DOE urges here.

10. DOE also argues that permitting producers to recoup tertiary expenses incurred and paid after decontrol is justified because the certification regulation, 10 C.F.R. § 212.131, permitted producers retroactively to increase the price of oil initially sold at price-controlled levels so long as the oil was certified or recertified as uncontrolled oil within the immediately succeeding two-month period.

11. DOE's reliance on the certification regulation is without merit. The regulation was adopted for reasons of administrative necessity unrelated to the Tertiary Program; it was adopted four years before the Tertiary Program was adopted; and it governed the pricing of all crude oil, not just tertiary incentive crude oil.

12. Most importantly, the certification regulation was not intended to confer substantive rights. Rather, it operated as a procedural limitation on the producer's right to claim the maximum lawful price for crude oil that he

had sold. Thus, the certification regulation permitted certification (or recertification) only of oil that was qualified for such certification by virtue of another, substantive provision of the regulations. After the Tertiary Program was ended by the Executive Order, crude oil could no longer become qualified for recertification.

13. Moreover, DOE itself has said that:

> *If crude oil would have otherwise qualified* for lawful recertification (or certification) *prior to the implementation of the Executive Order*, a producer may recertify (or certify) crude oil sold in the months of December 1980 and January 1981 . . . within the consecutive two-month period immediately following the month in which the sale was made.

Ruling 1981-1, Answer #5, 46 Fed. Reg. at 12947 (emphasis added). But crude oil had only "qualified" for certification or recertification as tertiary incentive crude oil "prior to" decontrol if the producer had incurred and paid tertiary expenses prior to decontrol. Thus, DOE's argument that the certification regulation itself permitted the extension of the Tertiary Program beyond decontrol is inconsistent with DOE's own views as expressed in Answer # 5.

14. The Court also finds that DOE's extension of the Tertiary Program beyond the date of decontrol was contrary to the intent of Congress in authorizing the provision of incentives for tertiary production. On that separate ground as well, the Court is required to find that the challenged portion of Ruling 1981-1 is unlawful.

15. Both parties agree that Congress acted in 1976 out of a desire to foster increased tertiary crude oil production. Crude oil price ceilings had restricted producers' current income, and uncertainty regarding decontrol inhibited long-term financing. Both the floor debates and the Conference Report on the legislation make clear that Congress' purpose was limited to correcting the disincen-

tive to tertiary production that had inadvertently been created by the then existing price controls. *See* 42 Fed. Reg. 2646, 2649-50, 2655-57 (January 12, 1977).

16. Senator Montoya introduced the amendment that was enacted. He made clear that the legislation was intended solely to remedy an unintended consequence of crude oil price ceilings: "The amendment . . . is an attempt to unblock the road toward full utilization of our domestic oil reserves. It is a way around the problem presented by price controls . . ." 122 Cong. Rec. at 18478 (June 16, 1976).

17. All of the legislators who spoke in support of the Montoya amendment expressed similar views. Senator Domenici said that the choice was whether to provide an incentive to offset controls or to wait until "there are no controls." *Id.* at 18479. Senator Bentsen said that the "one reason" tertiary projects were not being developed was the "artificial price controls," and that: "We must remove the artificial restraint that is preventing [tertiary] recovery. Senator Montoya's amendment would have the effect of removing these restraints . . . . We will never enjoy its benefits if we continue to frustrate its recovery by restrictive, artificial price controls." *Id.* at 18487.

18. The conference committee subsequently reaffirmed the rationale of the legislation. It said the new legislation was intended to provide "additional price incentives to those extraordinary and high-cost enhancement techniques commonly associated with tertiary applications which are uneconomical under today's pricing regimen." S. Conf. Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976).

19. "[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated . . . . The power of an administrative officer . . . is . . . only the power to adopt regulations to carry into effect the will of Congress . . . . A regulation which does not do

this, but operates to create a rule out of harmony with the statute is a mere nullity." *United States v. Larionoff*, 431 U.S. 864, 873 & n.12 (1977) (brackets omitted). DOE's action providing incentives for tertiary investments after decontrol was inconsistent with the congressional intent, and it was consequently unlawful.

20. This Court has carefully reviewed the decision in *Diamond Shamrock v. Edwards, supra.* Although this Court found the analysis in that decision helpful, it is unclear precisely what materials and arguments were before the Delaware Court with regard to the questions at issue here. In addition, it is well-established that decisions made on motions for preliminary injunction "are not determinative of those issues" at trial on the merits. *E.g., Bursten v. Phillips*, 351 F.2d 616 (9th Cir. 1965). "Based, as they usually are, on incomplete evidence and a relatively hurried consideration of the issues, these provisional decisions should not be used outside the context in which they originally were rendered." 11 Wright & Miller, *Federal Practice & Procedure: Civil* § 2950, at 494-95 (1973) (footnotes omitted). For these reasons, this Court has decided not to follow the *Diamond Shamrock* decision.

21. The Court wishes to make it clear that its decision in this action has no effect on tertiary costs incurred and paid before decontrol. Producers making such investments had qualified for benefits under the Tertiary Program before the Program ended. The Executive Order preserved their rights by permitting the certification or recertification of crude oil after January 28 insofar as it had been qualified for such action before that date. Executive Order § 2(a); 46 Fed. Reg. at 12946 (Answer # 1), 12947 (Answer # 5). This conclusion is also consistent with the intent of Congress in recognizing tertiary expenses incurred and paid during the period of the price control regimen.

22. But neither the languauge nor intent of the Order or the regulations, nor the history of the statute, is consistent with DOE's argument that producers could receive benefits under the Tertiary Incentive Program for new investments made after the date of decontrol. To the contrary, DOE's position contravenes the language and the intent of the President's Executive Order, the regulations, and the Congress.

23. For the reasons set out above, plaintiff's motion for summary judgment is granted and defendants' cross motion for summary judgment is denied.

24. Any of the foregoing Conclusions of Law deemed to be findings of fact are hereby incorporated into the preceding findings of fact.

DATED: 12/7/81

/s/ Terry J. Hatter, Jr.
TERRY J. HATTER, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 81-1961:TJH

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants.

[Entered December 9, 1981]

JUDGMENT

Upon consideration of the briefs, accompanying appendices, and other pleadings submitted by the parties, and the arguments presented by the parties at the hearing on the cross motions for summary judgment, and for the reasons set forth in the Court's Findings of Fact and Conclusions of Law, it is hereby ORDERED AND ADJUDGED:

1. That Ruling 1981-1 and any other action of the Department of Energy ("DOE") is unlawful, and therefore null and void, insofar as it purports to permit crude oil producers or others to certify or recertify price-controlled crude oil as tertiary incentive crude oil based on expenses incurred or paid after January 27, 1981.

2. That all such certifications or recertifications are null and void.

3. That DOE shall not take any enforcement or other action or issue any entitlement list or other order that would require plaintiff (a) to accept any such certification or recertification; or (b) to purchase any further entitlements or to make any other payments because of or arising out of any such certification or recertification; or (c) to purchase any further entitlements without having first credited plaintiff with the total amount plaintiff has heretofore paid to purchase entitlements because of or arising out of such certifications or recertifications.

4. That DOE shall pay the plaintiff's costs of this action, upon a Bill of Costs to be filed within 10 days hereof.

DATED: 12/7/81

/s/ Terry J. Hatter, Jr.
TERRY J. HATTER, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

CIV-R-81-99-ECR

TOSCO CORPORATION,
Plaintiff,

vs.

DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, JR., Secretary of Energy,
Defendants.

[Entered February 10, 1982]

MEMORANDUM DECISION

Cross-motions for summary judgment are before the Court. Extensive points and authorities have been filed, and oral argument has been heard, the plaintiff being represented by attorney Kenneth L. Bachman, Jr., and the defendants by attorney Katherine L. Henry.

The plaintiff (Tosco) is a refiner and marketer of petroleum products. However, it produces no crude oil. Its Complaint relates that defendant Department of Energy (DOE) was directed by Congress to amend its price and allocation regulations so as to provide additional price incentives for producers who would utilize tertiary enhanced recovery techniques. The objective was to increase domestic oil production by encouraging the use of engineering procedures that would not otherwise have been economically feasible at the time due to the price controls on crude oil produced in this country, according to the plaintiff.

The Complaint states that DOE adopted a Tertiary Incentive Program which, in essence, permitted a producer who incurred and paid expenses in connection with a qualified tertiary enhanced recovery project to recoup 75 percent of those expenses at once, even though the project would not be worked on until some future time. The recoupment was accomplished by permitting the producer to sell price-controlled crude oil, from any property in which it had an interest, at market price; that is, as though the oil was exempt from price controls.

If the recovery technique to be used was of a type listed by DOE, the producer self-certified its own project as qualified. If some other technique was to be utilized, DOE had to certify the project.

DOE's regulations, the Complaint continues, required a producer to certify to each purchaser of its oil, within two months after the month of sale, the price category of the oil. For example, crude oil purchased by a refiner in January at the lower price-controlled price for domestic oil could be recertified by the producer in March as tertiary incentive oil. Since tertiary incentive oil could be sold at market price, there was a substantial difference in cost to the refiner, who had to pay that difference. It amounted to a retroactive increase in price.

Under the Tertiary Incentive Program as originally promulgated, expenses paid to affiliated entities could not be recouped by the producer. To be recoupable, expenses had to have been incurred in arm's length transactions with non-related contractors. The Complaint alleges that on December 29, 1980, DOE amended the Program to allow expenses incurred and paid to affiliated entities to be recouped. DOE made the amendment effective on January 5, 1981, the date of its publication in the Federal Register, and applicable to expenses incurred and paid after December 29, 1980. As a result of the amendment, recertifications increased enormously, thereby subjecting

Tosco and other refiners to substantial additional financial burdens.

The plaintiff's Complaint recites that virtually all oil was decontrolled by President Reagan's Executive Order of January 28, 1981. That Order was immediately effective. Certain DOE regulatory programs were specifically excepted (left in effect), but the Tertiary Incentive Program was not one of them. However, DOE was expressly authorized to issue entitlement notices for the period up to the date of decontrol, although the notices would actually be issued subsequent to that date.

The entitlement program had been set up in order to spread the benefit of cheaper domestic oil throughout the petroleum industry. Basically, each refiner, whether a large integrated oil company or a small independent refiner, was entitled to a proportion of the lower priced domestic oil, based upon the total amount of crude oil each refined. Rather than actually transport domestic oil from one refinery to another, the equalization process was done on paper. A refiner who had received more than its proportionate share of price-controlled domestic oil during a month had to purchase entitlements from refiners who had received less than their shares. The cost of an entitlement represented the difference between the price per barrel of price-controlled crude and that of exempt (e.g., foreign or tertiary) crude. Because of the time necessary to enable the refiners to report to DOE, the time required by DOE to ascertain the size of the entitlements right of each refiner, and the time needed by DOE to calculate the dollar and cent value of an entitlement, entitlements notices were not issued by DOE until almost two months after the end of the calendar month to which they applied.

On February 12, 1981, DOE issued its Ruling 1981-1, which, in question and answer form, explained the effect of the President's decontrol Executive Order on DOE's allocation and price regulations. The Ruling declared that a producer could qualify under the Tertiary Incentive

Program subsequent to the date of the Executive Order. Further, the producer could recoup Tertiary Program expenses through recertification of an appropriate amount of its domestic oil sold during December 1980 and January 1981, just so those expenses were incurred and paid during the months of February 1981 and March 1981, respectively.

The Complaint complains that this amounted to a continuance of the Tertiary Incentive Program for two months after decontrol of oil by the Executive Order. The combination of such continuance and the regulatory amendment permitting recoupment of Tertiary project expenses incurred and paid to an affiliated ("in-house") entity resulted in recertification nationwide, under the Tertiary Incentive Program, of 290 percent more oil in the month after decontrol compared to the prior month. Plaintiff Tosco was subjected to recertification of twelve times as much crude oil in the first month after decontrol as for the last month prior thereto. This retroactive inincrease in price undermined the Entitlements Program, Tosco argues, because it had the effect of changing price-controlled oil to exempt market price oil.

The prayer of the Complaint asks for a declaratory judgment that: (1) Ruling 1981-1 and the actions of DOE pursuant thereto insofar as they permit recertifications of price-controlled oil after January 27, 1981, are unlawful and void; (2) all such recertifications are unlawful and void; and (3) the January 5, 1981, affiliate amendment to the Tertiary Incentive Program was promulgated contrary to the procedure required by law, so that the amendment and all recertifications pursuant thereto are unlawful and void. In addition, the prayer asks the Court to order DOE to identify all recertifications declared invalid as a result of this legal action and to issue an Entitlements Notice to rectify their effect on prior Entitlements Notices. Finally, the prayer of the Complaint asks this Court to determine that a substantial

constitutional issue exists with respect to recertifications after January 27, 1981, under Ruling 1981-1 and to certify the issue to the Temporary Emergency Court of Appeals.

The Answer of the defendants admits jurisdiction in this Court by reason of 15 U.S.C. § 754(a), which incorporates Section 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. It admits factual allegations of the Complaint, but denies the plaintiff's conclusions derived therefrom.

Discussion:

This Court has jurisdiction over the subject matter of this lawsuit, as framed by the pleadings. *See Diamond Shamrock Corp. v. Edwards*, 510 F.Supp. 1376, n.1 (D. Del. 1981); *People of State of California, State Lands Com'n. v. Simon*, 504 F.2d 430, n.3 (Em. App. 1974); *Energy Consumers, Etc. v. Dept. of Energy*, 632 F.2d 129, 139 (Em. App. 1980).

There are two separate matters at issue here. The first, chronologically, is DOE's amendment to 10 C.F.R. § 212.78, which regulation covers the Tertiary Incentive Program. From the start it defined "recoupable allowed expenses" as limited to expenses incurred in arm's length transactions. However, on August 15, 1980, DOE published in the Federal Register notice that it proposed to amend the regulation by permitting the recoupment of tertiary recovery expenses paid "in-house", that is for goods and services provided from within the producer's own firm. 45 Fed. Reg. 54688. The proposed amendment was adopted by DOE on December 29, 1980, and published as a final rule on January 5, 1981. 46 Fed. Reg. 1246. DOE made the amendment effective immediately, that is, on January 5, 1981, and applicable to expenses incurred or paid after December 29, 1980.

5 U.S.C. § 553(d), part of the Administrative Procedure Act, specifies that publication of a substantive rule

shall be made not less than 30 days before its effective date, with certain exceptions. It is applicable to DOE. *Atlantic Richfield Co. v. F.E.A.*, 429 F.Supp. 1052 (N.D. Cal. 1976), aff'd. 556 F.2d 542 (Em. App. 1977). DOE claimed that its "in-house" amendment fell within two of those exceptions; namely, the one for a substantive rule which relieves a restriction and the one for "good cause".

By claiming that it came within those exceptions to the statutory mandate, DOE acknowledged that its amendment was substantive. The exception for rules that relieve restrictions refers only to substantive rules. 5 U.S.C. § 553(d)(1). A rule change concerning interaffiliate transfers of natural gas liquids also was treated as substantive in *Amoco Production Co. v. Department of Energy*, 512 F.Supp. 815 (D.Del. 1981).

The justification for the "in-house" amendment, according to DOE, was that goods and services obtained from an affiliate should cost the producer less. Therefore, more efficient use of resources for Tertiary recovery projects would be accomplished.

The "good cause" exception to the 30-day waiting period, 5 U.S.C. § 553(d)(3), was invoked by DOE on the ground that it was in the public interest for the amendment to be made effective immediately. The combination of "economic efficiency and the lack of countervailing injury to others" was deemed to show that "the public interest favored—and thus good cause existed—to make the amendment effective immediately". The quotations are from page 35 of the defendants' memorandum of points and authorities filed herein September 23, 1981.)

Plaintiff Tosco has vigorously denounced DOE's circumvention of the 30-day waiting requirement. Tosco alleges that the effect of the amendment was not merely to relieve a restriction on the producers, but rather, it enabled the producers to shift to refiners 75 percent of the cost of the producers' Teritiary recovery projects. This

result was made possible, according to Tosco, because it was no longer necessary for the producers to actually pay those costs to an outside contractor before being allowed to recoup 75 percent of them from its refinery customers. After the amendment, a producer need only shift money from its left affiliate pocket to its right affiliate pocket in order to be able to claim the right to recoup.

The 30-day waiting period allows for scrutiny of the proposed rule by interested parties and their participation in the rule-making process. This serves to reduce the risk of factual errors, arbitrary actions and unforeseen detrimental consequences. *Chamber of Commerce of United States v. O.S.H.A.*, 636 F.2d 464 (D.C. Cir. 1980). "Charting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation." *Id.*, at 470. As a matter of sound policy, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced. *Western Oil & Gas v. United States E.P.A.*, 633 F.2d 803 (9th Cir. 1980).

DOE has recognized that the relieving of a restriction exception to the 30-day wait requirement is not applicable where additional burdens would be imposed on affected firms by the amendment to a rule. 45 Fed. Reg. 40106, 40107 (June 13, 1980). The change from a ban on recoupment of "in-house" payments to allowance of the same was a 180 degree reversal by DOE in its treatment of the subject. Such a radical departure requires prior opportunity for meaningful comment before the change takes effect. *See Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1062-1063 (Em. App. 1978).

The burden is on the agency to show the "good cause" that will justify its avoidance of the requirements of 5 U.S.C. § 553. *Western Oil & Gas v. United States E.P.A., supra.* The mere urgency of the proolem to be remedied

does not constitute such justification. *Id.* In this case, the notice of the proposed amendment was issued by DOE in early August 1980, so that there would have been time to comply with the 30-day wait requirement and still have the amendment take effect by January 5, 1981 (the date DOE made it effective). *See Consumers Union of United States, Inc. v. Sawhill*, 393 F.Supp. 639, 641 (D.C. D.C. 1975), aff'd sub nom, *Consumers Union of United States, Inc. v. Zarb*, 523 F.2d 1404 (Em. App. 1975); *Kelly v. United States Department of Interior*, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972).

The Court finds that DOE has failed to sustain its burden of showing that its making the "in-house" expenses amendment effective immediately upon publication of the final rule was justified under an exception to the 30-day wait required by 5 U.S.C. § 553(d). The Court holds that said action was unlawful as being done without observance of procedure required by law. 5 U.S.C. § 706 (2)(D); *see also* § 211(d)(1) of 12 U.S.C. § 1904 note.

The second matter at issue is the validity of DOE's Ruling 1981-1, published at 46 Fed. Reg. 12945 (February 19, 1981). Answer # 2 (the Ruling is in question and answer form) stated that DOE would publish in February 1981 an entitlements notice covering crude oil received at refineries during the month of December 1980, and also would publish in March 1981 an entitlements notice for crude oil received at refineries between January 1, 1981, and January 27, 1981, both dates inclusive. (The President's Executive Order 12287 decontrolling crude oil and refined petroleum products was effective January 28, 1981, the date of its issuance. 46 Fed. Reg. 9909 (January 30, 1981)).

Answer # 4 of Ruling 1981-1 declared that petroleum price regulations would not affect sales made after 12:01 a.m., January 28, 1981.

Answer # 5 asserted that crude oil sold during the months of December 1980 and January 1981, which would

have qualified for recertification in the absence of the Executive Order, could still be recertified (from the price-controlled price to market price) as Tertiary Incentive Program oil. However, the recertification would have to be made within the two-month period immediately following the month in which the sale was made. This was consistent with existing 10 C.F.R. § 212.131(a)(6). Accordingly, a producer could not recertify after March 1981.

Answer # 6 averred that a producer who had sold price-controlled crude oil prior to January 28, 1981, and who could lawfully recertify it pursuant to 10 C.F.R. 212.131(a)(6) would be permitted to do so.

Answer # 7 is the focal point of the instant cross-motions for summary judgment as to Ruling 1981-1. It correctly stated that, absent the Executive Order, a producer who incurred and paid Tertiary recovery expenses prior to February 28, 1981, and March 31, 1981, could have recouped those expenses through the recertification of crude oil it had sold in the months of December 1980 and January 1981, respectively. The controversial part of the answer then took the position that although the Executive Order was intended to provide for immediate decontrol of crude oil, it was not meant to abrogate a producer's right to recertify oil it had sold prior to the date of that Order. Thus, Answer # 7 concluded, a firm could qualify under the Tertiary Incentive Program after January 28, 1981, and then recertify oil it had sold during December 1980 and January 1981, so long as the Tertiary expenses were incurred, paid and reported prior to February 28, 1981, and March 31, 1981, respectively.

Tosco contends that Ruling 1981-1 is substantive (legislative) and should be held invalid because it wasn't promulgated in compliance with the procedural requirements of the Administrative Procedure Act. Those requirements deal with notice, opportunity for interested

parties to make known their views, and the aforementioned 30-day waiting period before a new rule becomes effective.

The Act specifically excepts interpretative (as contrasted to substantive) rules from the procedural requirements. 5 U.S.C. § 553. DOE stoutly maintains that Ruling 1981-1 was merely an interpretative explanation of the effect of the Executive Order on its existing regulations and rules. While DOE's characterization of its own ruling is not controlling, it is entitled to some judicial deference. *Energy Reserves Group, Inc., v. Department of Energy*, 589 F.2d 1082 (Em. App. 1978). Nevertheless, it is what the agency purported to do and has done that is decisive. *Chamber of Commerce of United States v. O.S.H.A.*, 636 F.2d 464 (D.C. Cir. 1980); *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029 (Em. App. 1978).

An explanation of existing regulations is an interpretative rule. *Continental Oil Company v. Burns*, 317 F.Supp. 194 (D.Del. 1970). The U.S. Supreme Court has taken into consideration whether the contested ruling is in conflict with earlier pronouncements of the same agency. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). I find that Ruling 1981-1 is consistent with DOE's prior position as to the relationship of the Tertiary Incentives Program with the entitlements program. Therefore, it is an interpretative rule and not invalid for failure to comply with procedural requirements. Chief Judge Latchum, of the District of Delaware has reached the same conclusion. *Diamond Shamrock Corporation v. Edwards*, 510 F.Supp. 1376 (D.Del. 1981).

Section 211(d)(1) of 12 U.S.C. § 1904 note incorporates the standards of 5 U.S.C. § 706 in determining the validity of DOE's Ruling. *See Texaco, Inc. v. Federal Energy Administration*, 531 F.2d 1071 (Em. App. 1976). In addition to the procedural requirements discussed above, Tosco argues that Ruling 1981-1 violates § 706 in that the Ruling was not in accordance with law, was

promulgated in excess of DOE's authority, and was arbitrary and capricious.

In considering a challenge to an interpretative rule, a court has the power to substitute its own judgment for that of the agency on questions of the legislative scheme and statutory interpretation. *Energy Reserves Group, Inc., v. Department of Energy, supra; Diamond Shamrock Corporation v. Edwards, supra.* The weight to be given to the agency's interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and those other factors which are persuasive. *UPG, Inc., v. Edwards*, 647 F.2d 147 (Em. App. 1981); *Standard Oil Co. v. Department of Energy, supra; General Electric Co. v. Gilbert, supra.*

Judge Hatter, of the Central District of California, has held that DOE's position, that producers could receive benefits under the Tertiary Incentive Program for new investments made after the date of decontrol, contravened the language and intent of the Executive Order, the existing regulations and legislative history. *Union Oil Company of California v. United States Department of Energy*, No. 81-1961 (C.D. Cal. 1/25/82). He points out that the Tertiary program was not meant to exist separate and apart from crude oil price controls. The disincentive of price controls is what caused expensive tertiary recovery programs to be economically unfeasible. When price controls ended, with the Executive Order, the need for special treatment in order to obtain market prices also ended, the Judge maintains.

The logic of Judge Hatter's reasoning, as far as it goes, is unassailable. However, DOE feels that it doesn't go far enough. Pursuant to Congressional directive in 15 U.S.C. § 757(j)(1)(A), on July 26, 1978, DOE issued a regulation, 10 C.F.R. 212.78, which exempted increased oil production developed by Tertiary recovery methods

from price controls; i.e., market price could be charged for the extra crude oil so produced. The results were disappointing. Apparently oil producers were unwilling to invest in risky Tertiary recovery projects solely on the basis of a hope that some years down the road the investment might become profitable by reason of obtaining market price for any extra oil recovered.

Therefore, on August 21, 1979, DOE amended 20 C.F.R. 212.78, 44 Fed. Reg. 51148 (August 30, 1979), by allowing producers who incurred and paid expenses in connection with a Tertiary project to recoup 75 percent of those expenses "up front" by charging market prices for otherwise price-controlled crude oil. The producer no longer had to wait until increased, Tertiary, production was obtained. Recoupment was permitted from the sale of other crude so soon as the Tertiary recovery financial obligation had been incurred and paid. It mattered not that the actual physical work on the Tertiary project might not commence until years in the future. It mattered not that the Tertiary project, when finally completed, might prove to be unsuccessful, so that little or no extra production actually would result. These are the factors for which simple price decontrol did not compensate.

Judge Hatter, in the *Union Oil* opinion, further finds Ruling 1981-1 invalid in that it permitted a producer to recoup Tertiary expenses not incurred and paid until after the decontrol Executive Order. He feels that the right to qualify for Tertiary incentives did not survive President Reagan's January 28, 1981 Order. Only producers who had qualified prior to that date should be allowed to recertify (retroactively raise the price) of oil sold during the months of December 1980 and January 1981. The two-month lag time after month of sale provided by 10 C.F.R. 212.131(a)(6) for recertification did not encompass the timing of expenditures, in Judge Hatter's view.

On the other hand, Chief Judge Latchum, in *Diamond Shamrock Corporation v. Edwards*, 510 F.Supp. 1376, 1389 (D.Del. 1981), found DOE's position on this issue to be "probably correct". Because the case before him involved a request for preliminary injunctive relief, he considered in some detail the question of which side would probably prevail on the merits. He held Ruling 1981-1 to be an interpretative rule which had no impact at all upon the plaintiff refiners by its own force. The impact upon them was by virtue of existing regulations. The opinion notes that the Executive Order specifically authorized DOE to "adopt such regulations and take such actions as he (the Secretary of Energy) deems necessary to implement this Order." Therefore, the plaintiffs had to show that the Ruling adopted an erroneous interpretation of the effect of the Executive Order on the regulations covering the entitlements program and the Tertiary Incentive Program.

A provision of the Executive Order specified that DOE could adopt regulations and take actions to promulgate entitlements notices for periods prior to the Order and also to establish a mechanism for entitlements adjustments for periods prior to the Order. Judge Latchum rejected the argument that this allowed merely the establishment of a mechanism to correct for errors in prior months. He feels that the Order "can only contemplate the regular promulgation of notices for crude oil purchases which took place in December and January." 510 F.Supp. at 1389. His opinion declares that DOE's longstanding interpretation of the entitlements program, which interpretation was developed outside the context of litigation, would necessitate the promulgation of entitlements notices two months after the program ended. He also suggested that in the absence of such entitlements, refiners who had purchased large quantities of price-controlled oil in December 1980 and January 1981 would receive a disproportionate windfall when they sold their refined products at decontrolled (market) prices.

As to the effect of the Executive Order on the Tertiary Incentive Program, the *Diamond Shamrock* opinion reiterates that the Order had no effect upon sales made prior to January 28, 1981. Judge Latchum continues, at page 1390:

> "Moreover, it did not revoke any validly promulgated regulations but instead, directed DOE to 'take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order.' Thus, the regulations allowing retroactive price increases in order to recoup certain expenses are still in force and because the President's Order did not apply to the oil sales before January 28, 1981, those still valid regulations would work to allow retroactive price increases."

Judge Latchum also points out that many of the projects which used the retroactive price increase were probably planned before the Executive Order, ". . . and the use of retroactive price increases to provide front end money was probably a material consideration in the planning." *Ibid.* In the case before me, my holding that the "in-house" expense amendment is invalid inadvertently lessens the chance for abuse of Ruling 1981-1. The Ruling's consistency with the long-standing position of DOE reinforces my finding that it is reasonable. *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

The allegation that the Ruling is arbitrary and capricious is rejected by my finding that it was based on a consideration of the relevant factors, that there was no clear error of judgment, and that DOE has demonstrated a rational connection between the facts and the choice it made. *See Mobil Oil v. Dept. of Energy*, 610 F.2d 796 (Em. App. 1979). The fact that the Ruling may have a substantial impact on Tosco and other refiners does not reflect inconsistency with the underlying law. *See Energy Reserves Group, Inc., v. Department of Energy*, 589 F.2d

1082, 1108 (Em. App. 1978). Refiners do not have any legal right to exclusive enjoyment, at the expense of producers, of the economic benefits of the petroleum price and allocation controls. *See Atlantic Richfield Company v. United States Department of Energy*, 655 F.2d 1118 (Em. App. 1981). After all, the producers bore the brunt of the control programs in that they were required to sell significant quantities of the oil they produced at below market prices.

It is the Court's conclusion that there is no genuine issue as to any material fact and that the moving parties are respectively entitled to judgment as a matter of law on the issues of the validity of the "in-house" expenses amendment and Ruling 1981-1, as above discussed. Accordingly, an order on the cross-motions for summary judgment shall be issued simultaneously herewith.

Nevertheless, the constitutional questions raised do have merit and neither the Temporary Emergency Court of Appeals nor the United States Supreme Court has rendered decisions foreclosing the issues, therefore I shall certify the issues as to the validity of said amendment and said Ruling to the Temporary Emergency Court of Appeals, pursuant to Section 211(c) of 12 U.S.C. § 1904 note.

DATED: February 10, 1982.

/s/ Edward C. Reed.
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

CIV-R-81-99-ECR

TOSCO CORPORATION,

Plaintiff,

vs.

DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, JR., Secretary of Energy,

Defendants.

[Entered February 10, 1982]

ORDER

The cross-motions for summary judgment of the plaintiff and the defendants having been fully considered by the Court and the Court's findings, conclusions and reasoning having been included in a Memorandum Decision of even date herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Department of Energy's Ruling 1981-1, published February 19, 1981, (46 Fed.Reg. 12945) is hereby declared to have been lawfully promulgated, and said Ruling and the policies of said Department pursuant thereto with respect to permitting recertification of price-controlled crude oil as tertiary incentive crude oil are hereby declared to be valid and enforceable.

2. The Department of Energy's "in-house" expenses amendment to the Tertiary Incentive Program, adopted on December 29, 1980, and published as a final rule on

January 5, 1981, (46 Fed.Reg. 1246) is hereby declared to be unlawful and null and void by reason of having been promulgated contrary to the procedure required by law.

3. All certifications and recertifications pursuant to the "in-house" expenses amendment described in paragraph 2, above, which have resulted in unreimbursed (by resellers) increases in the price of crude oil purchased by plaintiff Tosco Corporation are hereby declared to have been null and void.

4. The Department of Energy shall take all necessary actions to identify all certifications and recertifications declared null and void in paragraph 3, above, and the amounts of increased crude oil costs occasioned thereby to the plaintiff.

5. The Department of Energy shall promptly require the refund to the plaintiff of all unreimbursed (by resellers) payments for crude oil made by the plaintiff in excess of the maximum lawful price as a result of such certifications and recertifications.

6. The Department of Energy shall promptly correct the entitlements impact on the plaintiff of all such certifications and recertifications, including restoration to the plaintiff of the amounts by which the plaintiff's entitlement revenues have been or may be reduced or entitlement purchase obligations have been or may be increased as a result of such certifications and recertifications.

7. Each party to this action shall bear its own costs and fees.

DATED: February 10, 1982.

/s/ Edward C. Reed
EDWARD C. REED
United States District Judge

APPENDIX G

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 9-60

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants-Appellants.

No. 9-61

TOSCO CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, JR., SECRETARY OF ENERGY,
Defendants-Appellees.

Before CHRISTENSEN, JAMESON and ZIRPOLI, Judges.

ORDER

Upon consideration of the petitions for rehearing and/or suggestions for rehearing *en banc*, filed by Appellee Union Oil Company of California in No. 9-60, and by Appellant Tosco Corporation in No. 9-61, is it

ORDERED by the Court that the petitions for rehearing are DENIED, and it is

FURTHER ORDERED by the Court that the suggestions for rehearing *en banc* are also DENIED. The mandate will issue October 12, 1982.

FOR THE COURT:

DONNA M. BOLD
Clerk

By: /s/ Patricia L. Krosel
PATRICIA L. KROSEL
Chief Deputy Clerk

October 5, 1982

APPENDIX H

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 9-60

UNION OIL OF CALIFORNIA,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Defendants-Appellants.

ORDER

Before: CHRISTENSEN, JAMESON and ZIRPOLI, *Judges.*

Upon consideration of the motion of Appellee, Union Oil Company of California, for stay of mandate pending application to the Supreme Court of the United States for a Writ of Certiorari, it is hereby

ORDERED that said motion is GRANTED and issuance of the mandate herein shall be stayed pending the timely filing of a petition for Writ of Certiorari by Appellee, Union Oil Company of California, which shall be filed no later than November 4, 1982.

FOR THE COURT

DONNA M. BOLD,
Clerk

by: /s/ Andrew R. McCorkle
ANDREW R. MCCORKLE
Deputy Clerk

[Entered October 12, 1982]

APPENDIX I

STATUTORY AND REGULATORY MATERIALS INVOLVED

Section 4(a) of the Emergency Petroleum Allocation Act, as amended, 15 U.S.C. § 753(a), provides:

> Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

Section 8(j)(1) of the Act, 15 U.S.C. § 757(j)(1), provides:

> As soon as practicable after August 14, 1976, . . . the President shall promulgate such amendments to the regulation under section 753(a) of this title (relating to price) as shall (A) provide additional price incentives for bona fide tertiary enhanced recovery techniques . . . .

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . .

Executive Order 12287 provides:

DECONTROL OF CRUDE OIL AND REFINED PETROLEUM PRODUCTS

By the authority vested in me as President by the Constitution and statutes of the United States of America, including the Emergency Petroleum Allocation Act of 1973, as amended (15 U.S.C. 751 *et seq.*), and notwithstanding the delegations to the Secretary of Energy in Executive Order No. 11790, as amended by Executive Order No. 12038, and in order to provide for an immediate and orderly decontrol of crude oil and refined petroleum products, it is hereby ordered as follows:

Section 1. All crude oil and refined petroleum products are exempted from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended. The Secretary of Energy shall promptly take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order.

Sec. 2. Notwithstanding Section 1 of this Order;

(a) All reporting and record-keeping requirements in effect under the Emergency Petroleum Allocation Act, as amended, shall continue in effect until eliminated or modified by the Secretary of Energy. The Secretary of Energy shall promptly review those requirements and shall eliminate them, except for those that are necessary for emer-

gency planning and energy information gathering purposes required by law.

(b) The State set-aside for middle distillates (Special Rule 10, 10 CFR Part 211, Subpart A, Appendix A) shall remain in effect until March 31, 1981.

(c) The special allocation of middle distillates for surface passenger mass transportation (Special Rule 9, 10 CFR Part 211, Subpart A, Appendix A) shall remain in effect until March 31, 1981.

(d) The Buy-Sell lists and orders issued prior to this Order under the Buy-Sell Program and the Emergency Buy-Sell Program (10 CFR 211.65) shall remain in effect according to their terms and the Secretary of Energy may issue such further orders as may be necessary to give effect to lists and orders issued prior to this Order.

(e) The Canadian Allocation Program (10 CFR Part 214) shall remain in effect until March 31, 1981.

Sec. 3. The Secretary of Energy may, pursuant to Executive Order No. 11790, as amended by Executive Order No. 12038, adopt such regulations and take such actions as he deems necessary to implement this Order, including the promulgation of entitlements notices for periods prior to this Order and the establishment of a mechanism for entitlements adjustments for periods prior to this Order.

Sec. 4. The Secretary of Energy is authorized to take such other actions as he deems necessary to ensure that the purposes of this Order are effectuated.

Sec. 5. Because advance notice of and public procedure on the decontrol provided by this Order would be likely to cause actions that could lead to economic distortions and dislocations, and would therefore be contrary to the public interest, this Order shall be effective immediately.

/s/ Ronald Reagan
RONALD REAGAN

THE WHITE HOUSE,
January 28, 1981.

Ruling 1981-1, 46 Fed. Reg. 12945 (February 19, 1981), provides:

Question #7: May a firm first become a qualified producer as defined in 10 CFR 212.78(c) on or after January 28, 1981? Moreover, may the retroactive recertification of crude oil sold in the months of December 1980 and January 1981 as tertiary incentive crude oil be used to recover recoupable allowed expenses that are incurred, paid, and reported after the effective date of the Executive Order, but within the consecutive two-month certification is permitted under 10 CFR 212.131(a)(6)?

Answer #7: The Tertiary Incentive Program provides that first sales of crude oil by or on behalf of a qualified producer are not subject to the ceiling price limitations of 10 CFR Part 212, Subpart D, provided that the tertiary incentive revenue does not exceed the allowed expenses attributable to the producer. Tertiary incentive revenue is the difference between the controlled price and the market price received by the qualified producer in accordance with 10 CFR 212.78 and constitutes the front-end money which is the incentive that the program is intended to provide.

Absent the Executive Order, a qualified producer that would have incurred, paid, and reported its allowed expenses prior to February 28 and March 31, 1981, respectively, could have recovered those expenses through the recertification of crude oil sold in the months of December 1980 and January 1981, respectively, as long as those recertifications were made within the consecutive two-month period within which such certification is permitted under 10 CFR 212.131(a)(6). Executive Order 12287 is intended to provide for an immediate decontrol of crude oil and refined petroleum products. The Order does not abrogate the right that accrued to a firm to establish prices for crude oil prior to January 28, 1981. Thus, a firm may become a qualified producer as defined in 10 CFR 212.78(c) on or after January 28, 1981. A

qualified producer may also recover allowed expenses through the recertification of crude oil sold in the months of December 1980 and January 1981, respectively, as long as the producer has incurred, paid, and reported those expenses prior to February 28 and March 31, 1981, respectively.

Section 212.78 of the Mandatory Petroleum Price Regulations, 10 C.F.R., Part 212, provides:

§ 212.78 Tertiary Incremental Crude Oil and Tertiary Incentive Crude Oil

(a) *Rule*

(1) *Incremental tertiary crude oil.* Notwithstanding the provisions of § 212.73(a), first sales of incremental crude oil resulting from the implementation or expansion of a qualified tertiary enhanced recovery project are not subject to the ceiling price limitations of this subpart.

(2) *Tertiary incentive crude oil.* Notwithstanding the provisions of § 212.73(a), beginning January 1, 1980, first sales of crude oil by or for the behalf of a producer are not subject to the ceiling price limitations of this subpart, provided that the tertiary incentive revenue from such sales does not exceed the recoupable allowed expenses attributable to that producer.

(b) *Applicability of subparagraph (a)(1) to existing tertiary enhanced recovery projects*

Incremental crude oil produced from a tertiary enhanced recovery project, or expansion thereof, which was initiated prior to the date on which a producer has satisfied the requirements of either subsection (d)(1) or (e)(1) of this section with respect to that project, may qualify for pricing in accordance with subsection (a)(1) of this section only if:

(1) The producer affirms that he intends to discontinue the project (or the particular high-cost phase of the proj-

ect) in the absence of permission to price production therefrom in accordance with subsection (a)(1) of this section, because continuation of the project (or the particular high-cost phase) would be uneconomic at the otherwise applicable ceiling price;

(2) There has been a material change of circumstances since the time that the project was initiated or expanded; and

(3) The project is certified pursuant to subsection (e)(1). For the purposes of determining eligibility for certification, an existing project shall be examined prospectively, on the basis of the circumstances existing at the time such certification is sought.

(c) *Definitions.* For purposes of this section—

"Alkaline (or caustic) flooding" means an augmented waterflooding technique in which the water is made chemically basic as a result of the addition of alkali metals. The concentration and size of the alkaline slug must be at least 500 ppm-PV for the alkaline concentration multiplied by the pore volume of the alkaline slug.

"Allowed expense" means seventy-five percent of an environmental expense or seventy-five percent of an engineering and laboratory expense or seventy-five percent of an expense listed either in the appendix to this section or in an order issued pursuant to either subsection (e)(2) or (e)(3) of this section; provided that, an allowed expense may not be based on an expense incurred and paid prior to August 22, 1979. No more than one million dollars or twenty-five percent, whichever is less, of the total amount of allowed expenses with respect to a particular project may be based on engineering and laboratory expenses. The allowed expenses of a particular project shall be attributable to the qualified producer(s) with respect to that project. Where there is more than one qualified producer, the qualified producers shall allocate these expenses among themselves in whatever manner they

determine. With respect to a particular property, the total amount of allowed expenses may not exceed twenty million dollars.

"Certifying authority" means the Administrator, Economic Regulatory Administration, Department of Energy, or any officer of the Department of Energy to whom the Administrator has delegated such functions.

"Conventional steam drive injection" means the continuous injection of at least 50% quality steam (surface conditions) into one set of wells (injection wells) to effect oil displacements toward any production from a second set of wells (production wells). The process may include the prior, concurrent, alternating or subsequent injection of water, solvents and/or other fluids into any portion of the reservoir to assist in recovery and conformance.

"Cyclic steam injection" means the alternating injection of at least 50% quality steam (surface conditions) and production of oil with condensed steam from the same well or wells.

"Engineering and laboratory expense" means an expense relating to field-laboratory quality control equipment, reservoir and geologic evaluation as required for optimum process design, engineering plans, facility design, and laboratory/field process optimization (tracer, pressure transient, injectant quality, etc.)

"Enhanced heavy oil recovery technique" means any technique for the recovery of crude oil with a gravity less than 16° API.

"Environmental expenses" means those expenses that are incurred in connection with a particular project to the extent that those expenses are necessary to comply with federal or state environmental regulations applicable to that project.

"Immiscible gas displacement" means injection of non-hydrocarbon gas into an oil reservoir to effect oil dis-

placement under conditions in which miscibility with reservoir oil is not obtained. The process may include the concurrent, alternating, or subsequent injection of water. The injected fluid measured at reservoir temperature and pressure must, with reasonable expectation, be more than 10 percent of the reservoir pore volume being served by the injection well or wells.

"In situ combustion" means combustion of oil in the reservoir, sustained by continuous air injection, to displace unburned oil toward producing wells provided that such combustion must be intended to continue until at least 15 percent of the reservoir volume being served by the injection well or wells has been burned. The process may include the concurrent, alternating, or subsequent injection of water.

"Incremental crude oil" means the amount of crude oil which is or will be produced as a result of the initiation or expansion of a qualified tertiary enhanced recovery project and which is in excess of the amount of crude oil ("non-incremental crude oil") which could have been produced from the property or project area through continued maximum feasible production from methods of production employed on the property prior to compliance with the requirements of subsection (d) (1) or subsection (e) (1) of this section, whichever is applicable. As applied to an existing project within the meaning of subsection (b) of this section, the term means the amount of crude oil which is or will be produced as a result of the continuation of the project and which is in excess of the amount of crude oil ("non-incremental crude oil") which could have been produced from the property or project area through continued maximum feasible production from methods of production (other than the tertiary method, or that phase of such method, that would be discontinued in the absence of the incentive) employed on the property prior to receipt of the certification provided for in subsection (e) (1) of this section. The actual

amount of incremental crude oil in the case of any particular project shall be the amount produced from the property or project area during the period in question which is in excess of the amount of the non-incremental crude oil for that period as set forth in a certification by a producer pursuant to subsection (d)(1) or as certified by the certifying authority pursuant to subsection (e)(1) of this section; provided that, ERA may adjust the amount of non-incremental crude oil.

"Initiation" (of a project) means the start, on a regular basis, of a process that is intended to increase crude oil production.

"Microemulsion (or micellar/emulsion) flooding" means an augmented waterflooding technique in which a surfactant system is injected in order to enhance oil displacement toward producing wells. A surfactant system normally includes a surfactant, hydrocarbon, cosurfactant, an electrolyte and water, and polymers for mobility control. The concentration and size of the micellar slug (not including the polymers and other non-surface active materials) must be more than 3000 ppm-PV for the combined active surfactant concentration and active cosurfactant concentration in the slug multiplied by the pore volume of micellar slug.

"Miscible fluid displacement" means an oil displacement process in which fluid is injected into an oil reservoir, at pressure levels such that the injected fluid and reservoir oil are miscible. The process may include the concurrent, alternating, or subsequent injection of water. The injected fluid measured at reservoir temperature and pressure must, with reasonable expectations, be more than 10 percent of the reservoir pore volume being served by the injection well or wells. Gas cycling, i.e., gas injection into gas condensate reservoirs, is not a miscible fluid displacement technique nor a tertiary enhanced recovery technique.

"Polymer augmented waterflooding" means augmented water-flooding in which polymers are injected with the water to improve areal and vertical sweep efficiency.

"Qualified producer" means, with respect to a particular project, a producer that possesses an interest in the property on which the project is located and contributes to the initiation or expansion of the project, provided that the producer has complied with the requirements of subsections (d)(2) or (e)(2) of this section, whichever is applicable.

"Qualified tertiary enhanced recovery project" means a project for the recovery of crude oil, to the extent that such project involves the application of an enhanced oil recovery technique; provided that, with respect to that project, a producer has complied with the requirements of either subsection (d)(1) or (e)(1) of this section, whichever is applicable.

"Recoupable allowed expenses" means those allowed expenses that have been paid and reported pursuant to subsection (h) of this section and, with respect to a particular producer, those allowed expenses that are attributable to that producer; provided that (1) such expenses that are incurred and paid prior to December 29, 1980, are incurred in arm's-length transactions and for fair market value, or (2) such expenses that are incurred or paid on or after December 29, 1980, are incurred in arm's-length transactions and do not exceed the price that the producer would have paid in an arm's-length transaction.

"Selfcertifiable EOR technique" means any of the following enhanced oil recovery techniques: (a) miscible fluid displacement; (b) conventional steam drive injection; (c) unconventional steam drive injection; (d) microemulsion flooding; (e) in situ combustion; (f) polymer augmented waterflooding; (g) cyclic steam injection; (h) alkaline flooding; (i) immiscible non-hydrocarbon gas displacement; or (j) any enhanced heavy oil recovery technique.

"Self-certifiable tertiary project" means a project for the recovery of crude oil to the extent that crude oil production from that project results from the initiation after September 30, 1979 of one of the following techniques: (a) unconventional steam drive injection, (b) in situ combustion, (c) microemulsion flooding, or (d) miscible fluid displacement.

"Tertiary incentive revenue" means, in the case of first sales of crude oil pursuant to the provisions of subsection (a)(2), the excess of the market-clearing price over the otherwise applicable ceiling price less any *ad valorem*, severance or windfall profit tax attributable to this excess.

"Unconventional steam drive injection" means the continuous injection of at least 50 percent quality steam (at surface conditions) into one set of wells (injection wells) to effect oil displacement toward and production from a second set of wells (production wells). The process may include the prior, concurrent, alternating or subsequent injection of water, solvents, and/or other fluids into any portion of the reservoir to assist in recovery and conformance. This applies only to steam drive projects with an average depth greater than 2500 ft. or steam drive projects which recover oil with a gravity less than 10° API.

"Well costs" means the non-capital expenses incurred in the reworking or reconditioning of wells to be used in the field project (as recognized by the Internal Revenue Service), the non-capital expenses incurred in the abandonment or reabandonment of wells (as necessary for proper engineering and environmental protection of the project) less any salvage value, and the intangible drilling costs of new production, injection and test/evaluation wells needed for the project (as recognized by the Internal Revenue Service).

(d) *Self-certification*

(1) *Qualified tertiary enhanced recovery projects.* With respect to a self-certifiable tertiary project, a pro-

ducer shall certify to the certifying authority by certified mail that the project is a self-certifiable tertiary project. In this certification a producer must set forth, to the best of its ability, the amounts of non-incremental and incremental crude oil which will be produced in association with the project and the basis on which it determined these amounts.

(2) *Qualified producers.* A producer shall be considered a qualified producer with respect to a particular project if it certifies to the certifying authority by certified mail that that project employs a self-certifiable EOR technique.

(3) *Disallowance or modification of self-certifications.* A self-certification pursuant to either subsection (d)(1) or (d)(2) of this section shall be subject to disallowance or modification, at any time and either retroactively or prospectively or both, as and to the extent that the ERA determines to be appropriate:

(i) if the producer does not certify in good faith or implement the project in good faith; or

(ii) if certification was based on a material error or emission of fact of which the producer knew or should have known or to which the producer contributed; or

(iii) if the producer does not adhere to the requirements of this section or any additional conditions and limitations which the ERA may prescribe.

(e) *ERA certification*

(1) *Qualified tertiary enhanced recovery projects.* A producer shall obtain final certification from the certifying authority that the project (or expansion) is a qualified tertiary enhanced recovery project and that the project would not be economic at the otherwise applicable ceiling prices. In addition, such producer shall obtain final certification of the amount of incremental and non-incremental crude oil which will result from the imple-

mentation (or expansion) of such project. The amount of incremental and non-incremental crude oil shall be expressed in terms of both the total amount of incremental and non-incremental recovery over the life of the project (or such shorter period as the certifying authority determines to be appropriate) and in terms of incremental and non-incremental production estimates, commencing with the time that the project is estimated to begin producing incremental crude oil.

(2) *Qualified producers.* With respect to a project that does not employ a self-certifiable EOR technique, a producer shall obtain a final order from ERA that designates it as a qualified producer engaged in the initiation or expansion of a tertiary project that involves high levels of risk and of cost and that sets forth what the allowed expenses will be with respect to that project.

(3) *Allowed expenses.* With respect to a project that employs a self-certifiable EOR technique, a producer may request a final order from ERA that designates allowed expenses with respect to that property in addition to those based on environmental expenses, engineering and laboratory expenses, or expenses listed in the appendix to this section.

(4) *General procedures.* In order to receive an order pursuant to either subsection (e)(1), (e)(2), or (e)(3) a producer shall submit a signed application to ERA. The general procedures of Subpart G of Part 205 of this Chapter (§ 205.90 *et seq.*) shall apply to such an application. A producer that requests such an order shall have the burden of establishing its entitlement to the requested order and shall submit all data, required by these regulations or guidelines issued pursuant thereto or reasonably demanded by ERA.

(5) *Conditions and limitations within orders.* In addition to the conditions and limitations set forth elsewhere in this section, ERA may, in its discretion, prescribe such

other conditions and limitations within an order as are consistent with the requirements of this section and as are determined to be reasonably necessary, either to assure that the purposes of this section are not frustrated, or to promote the effective administration of the programs established by this section.

(6) *Revocation or modification of order.* A final order shall be subject to revocation or modification, and any time and either retroactively or prospectively or both, as and to the extent that the ERA determines to be appropriate: (i) if the producer does not obtain the order in good faith or implement the project in good faith; or (ii) if the order was issued on the basis of a material error or omission of fact of which the producer knew or should have known or to which the producer contributed; or (iii) if the producer does not adhere to the requirements of this section or any additional conditions and limitations which ERA may prescribe.

(f) *Additional procedures and criteria.* The ERA may from time to time publish, or otherwise make available to producers and the public, additional instructions or guidelines setting forth procedures to be followed and criteria to be applied in obtaining or making the certifications provided for in subsections (d) or (e); *provided, however,* that such instructions or guidelines shall not be mandatory or binding upon the ERA or the certifying authority, and shall not create or enlarge any procedural or substantive rights against the ERA.

(g) *Base production control level adjustments under the tertiary incremental program; measurement of post-certification production.* Notwithstanding any other provision of this part, and except as otherwise prescribed by ERA, a producer shall adjust the base production control level for a property (including any unitized property for which a unit base production control level has been established) on which a qualified tertiary enhanced recovery

project is being implemented, and shall measure production from such property, as follows:

(1) *Projects involving an entire property.* Where the project is determined to involve or affect the entire property, upon commencement of the production of incremental crude (as determined in the certification) the property's base production control level shall be deemed to be the same proportion to the total amount of non-incremental crude oil (as such non-incremental crude oil is determined in the certification for the period concerned) as the amount of old crude oil produced from such property in the twelve-month period immediately preceding the month in which incremental crude oil production commences bears to total crude oil produced from that property during the same twelve-month period. The property's base production control level may thereafter be adjusted as provided in § 212.76 or as provided in the preceding sentence, i.e., as the non-incremental crude oil production from the property (as determined in the certification) may vary from period to period.

(2) *Projects involving a portion of a property.* Where the project is determined to involve or affect only a portion of a property (including a unitized property for which a unit base production control level has been established), upon commencement of the production of incremental crude oil (as determined in the certification) the unaffected portion of the property shall receive the entire property's base production control level existing at the time incremental crude oil production commences. The amount of crude oil production to be credited against such base production control level shall be the sum of (i) the separately measured actual production from the unaffected portion of the property, plus (ii) the amount of non-incremental production (as established in the certification) for the project area for the period concerned (or the actual production from the project area for that pe-

riod, if less than said non-incremental production). The base production control level may thereafter be adjusted as provided in § 212.76. It shall be a condition of any certification applying to only a portion of a property that the producer shall undertake to measure actual production from the affected portion and the unaffected portion separately, by such means as certifying authority may from time to time prescribe either at the time of certification or at any time thereafter.

(h) *Reporting requirements*

(1) (i) *Monthly producer reports.* By the close of each month, a qualified producer shall file with DOE a report in which the producer shall certify (A) the recoupable allowed expenses attributed to it during the previous month; (B) the project from which each such expense is attributed; (C) the cumulative total of recoupable allowed expenses attributed to it at the close of the previous month; (D) the amount of tertiary incentive revenue received by it during the previous month; (E) the cumulative total of tertiary incentive revenue received by it at the close of the previous month; (F) the properties from which tertiary incentive crude oil was sold by or for the interest of the producer and the amounts sold from each such property during the previous month; (G) the maximum lawful selling price(s) of crude oil from each such property absent the provisions of subsection (a) (2) of this scetion; (H) the price at which tertiary incentive crude oil was actually sold at each such property; and (I) the names of the purchasers of tertiary incentive crude oil. Copies of the certifications provided to purchasers of tertiary incentive crude oil under section 212.131 shall be attached to this report.

(ii) *Annual CPA opinion.* Within 120 days of the close of each fiscal year that ends on or after December 31, 1980, of a particular qualified producer, that qualified producer shall submit to DOE an opinion by a certified public accountant attesting that during the course of its

annual audit nothing has come to its attention that causes it to believe that the reports submitted by that producer in accordance with paragraph (h)(1)(i) of this section are inaccurate.

(iii) An operator of a tertiary project may file the reports required by paragraph (h)(1)(i) of this section on behalf of any producer that is a qualified producer with respect to the project, *provided that*, (1) the operator and the producer agree to the operator's filing; (2) the producer is not a qualified producer with respect to any other project; and (3) no crude oil is sold by or for the behalf of the producer to paragraph (a)(2) of this section except from properties on which the project is located. For purposes of this paragraph, the term "operator of a tertiary project" shall include with respect to a particular project any qualified producer for that project that purchases crude oil produced from a property on which that project is located.

(2)(i) *Monthly project reports.* With respect to a particular project, the qualified producers therefor shall submit to DOE by the close of each month a consolidated monthly report in which they shall certify (A) the recoupable allowed expenses for the previous month; and (B) the amount of such recoupable allowed expenses attributable to each qualified producer.

(ii) *Annual CPA opinion.* Within 120 days of the close of each fiscal year that ends on or after December 31, 1980, for a particular project, the qualified producers with respect to that project shall submit to DOE an opinion by a certified public accountant attesting that during the course of its annual audit nothing has come to its attention that causes it to believe that the reports with respect to that project submitted during the prior calendar year in accordance with paragraph (h)(2)(ii) of this section are inaccurate.

(3) *Initial report.* A producer shall file with the certifying authority an initial report on which project with

respect to which the producer is a qualified producer prior to its recouping any allowed expenses attributable to it from that project. The contents of this report will be set forth in the guidelines to this section.

(4) *Annual report.* Each year the qualified producers with respect to a project shall file an annual report on the status of that project with DOE by the anniversary of the filing of the first initial report on that project. The contents of this report will be set forth in the guidelines to this section.

(5) (i) *Annual prepaid expenses report.* By January 31 of each year after 1980, a qualified producer shall file with DOE a report in which the producer shall certify to DOE (A) which of the expenses that it had reported previously to DOE pursuant to paragraph (h) (1) (i) of this section were prepaid expenses; (B) the goods or services for which it incurred and paid such prepaid expenses; (C) the dates on which it intends to use such goods or services; and (D) the dates on which it actually uses such goods or services. A producer shall file an annual prepaid expenses report each year until it has reported that it has actually used all the goods and services for which it incurred and paid a prepaid expense. For purposes of this subsection, a prepaid expense is an expense for any injectant or fuel used after September 30, 1981, or an expense for any other item to the extent that IRS would allocate the deductions (including depreciation) for that item to the period after September 30, 1981.

(ii) *Recordkeeping requirements.* A qualified producer must maintain records that contain a copy of any contract for or documentary evidence of a purchase of any good or service for which the producer has reported a prepaid expense.

(6) *In-house expenses.* In complying with the reporting requirements of paragraphs (h) (1) (i) and (h) (2) (i) of this section, a qualified producer shall indicate

whether an expense is incurred in an arm's-length transaction. If an expense is not incurred in an arm's-length transaction, the producer must prepare and maintain records that identify the expense and that contain information concerning what the price of the good or service associated with that expense would have been in an arm's-length transaction and the basis for that information.

Section 212.131 of the Mandatory Petroleum Price Regulations, 10 C.F.R., Part 212, provides:

§ 212.131 Certification of domestic crude oil sales.

(a) (1) *Stripper well properties.* With respect to each stripper well property, the producer shall certify in writing once to each purchaser of crude oil produced from that property:

(i) That the property concerned has qualified as a stripper well property; and

(ii) The average daily production per well for the 12-month period during which the property qualified as a stripper well property.

(2) *Newly discovered crude oil properties.* With respect to each newly discovered crude oil property, the producer shall certify in writing once to each purchaser of crude oil produced from that property that the property concerned has qualified as a newly discovered crude oil property.

(3) *Heavy crude oil properties.* With respect to each heavy crude oil property, the producer shall certify in writing once to each purchaser of crude oil produced from that property that the property concerned has qualified as a heavy crude oil property.

(4) *Other properties.* (i) With respect to each sale of crude oil from a property (other than a stripper well property, a newly discovered crude oil property, or a heavy crude oil property), the producer shall certify in writing to each purchaser the number of barrels, if any, of—

(A) Lower-tier ("old") crude oil (separately identifying any California lower-tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such California lower tier crude oil at the time of the sale);

(B) Upper-tier ("new") crude oil (separately identifying any California upper tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such California upper tier crude oil at the time of the sale), excluding any crude oil transported through the trans-Alaska pipeline;

(C) Crude oil transported through the trans-Alaska pipeline (separately identifying ANS upper tier crude oil and ANS crude oil that is not subject to the ceiling price limitations of this Part);

(D) Incremental tertiary crude oil as determined pursuant to § 212.78;

(E) Tertiary incentive crude oil as determined pursuant to § 212.78;

(F) Market level new crude oil as determined pursuant to § 212.74;

(G) Imputed stripper well crude oil determined pursuant to § 212.75(b);

(H) Imputed newly discovered crude oil determined pursuant to § 212.75(b);

(I) Imputed heavy crude oil determined pursuant to § 212.75(b); and

(J) Other domestic crude oils, the first sale of which is exempt from Part 212.

(ii) With respect to each property which has not been certified to a purchaser as a stripper well property, a newly discovered crude oil property, or a heavy crude oil property, the producer shall certify in writing once to

each purchaser of crude oil produced and sold from that property:

(A) The highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; and

(B) The highest posted price on September 30, 1975 for transactions in that particular grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted.

(5) *One-Time certifications.* (i) Except as provided for in paragraphs (a)(5) (ii) and (iii) of this section, with respect to any property (except a unitized property) from which crude oil is sold to only one purchaser, the requirements of paragraph (a)(4)(i) of this section may be complied with by a one-time written certification to the purchaser of the property's monthly base production control level determined pursuant to § 212.72, whether based upon production and sale of crude oil in 1972 or upon production and sale of old crude oil in 1975, or upon production and sale of old crude oil during the six-month period ending March 31, 1979, and, if applicable, either the property's adjusted base production control level determined pursuant to § 212.76 or the information necessary to compute such adjusted base production control level pursuant to § 212.76.

(ii) Except as provided for in paragraph (a)(5)(iii) of this section, with respect to any unitized property for which the producer has determined a unit base production control level and from which crude oil is sold to only one

purchaser, the requirements of paragraph (a)(4)(i) of this section may be complied with by a one-time written certification to the purchaser of—

(*1*) The monthly unit base production control level, determined pursuant to § 212.75(b);

(*2*) The number of barrels of "imputed new crude oil," if any, determined pursuant to § 212.75(b), excluding any crude oil transported through the trans-Alaska pipeline;

(*3*) The number of barrels of crude oil transported through the trans-Alaska pipeline (separately identifying ANS upper tier crude oil and ANS crude oil that is not subject to the ceiling price limitations of this part), if any;

(*4*) The number of barrels of imputed newly discovered crude oil, if any, determined pursuant to § 212.75(b);

(*5*) The number of barrels of imputed stripper well crude oil, if any, determined pursuant to § 212.75(b); and

(*6*) The number of barrels of imputed heavy crude oil, if any, determined pursuant to § 212.75(b).

(iii) Notwithstanding the provisions of paragraphs (a)(5)(i) and (ii) of this section, a producer shall certify in writing to each purchaser: (A) In each sale the amounts and gravity of California upper tier crude oil; (B) in each sale the amount of crude oil that is being sold as tertiary incentive crude oil pursuant to § 212.78(a)(2) and shall identify whether this amount would have been lower-tier crude oil or upper-tier crude oil except for its certification as tertiary incentive crude oil; and (C) once, if tertiary incremental crude oil may be sold from a property pursuant to § 212.78(a)(1), the amounts of non-incremental crude oil production from that property for each month, as determined pursuant to § 212.78.

(iv) With respect to U.S.-owned crude oil sold pursuant to the Naval Petroleum Reserves Production Act of 1976

(Pub. L. 94-258), the producer may comply with the requirements of paragraph (a)(4)(i) by certifying in writing once to each purchaser of such crude oil produced and sold from a property that the first sale of such crude oil from that property is exempt from the provisions of this Part.

(6) *Time of certifications.* Certifications required or authorized by this paragraph (a) to be made once shall be made within the consecutive two-month period immediately following the first month that the oil in question is produced and sold. Certifications required by this paragraph (a) to be made with respect to each sale shall be made within the consecutive two-month period immediately following the month in which that sale is made. After the close of the two-month period immediately succeeding the month in which crude oil is produced and sold, no certification, other than a certification for lower-tier ("old") crude oil, shall be effective with respect to the purchaser of that crude oil, except where such certification explicity is required or permitted by DOE order, interpretation or ruling.

(b)(1) *Reseller certification.* Each seller of domestic crude oil, other than a producer of domestic crude oil covered by paragraph (a) of this section, shall, with respect to each sale of domestic crude oil other than an allocation sale pursuant to § 212.65 of Part 211, or a sale in which no volumes of domestic crude oil are deemed to have been transferred pursuant to § 211.67(g) of Part 211, certify in writing to the purchaser (i) that the price charged for the domestic crude oil is not greater than the maximum price permitted pursuant to this part and (ii) the respective volumes of and respective per barrel prices for the—

(A) Lower-tier ("old") crude oil (separately identifying any California lower tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in

degrees API of such California lower tier crude oil at the time of the sale);

(B) Upper-tier ("new") crude oil (separately identifying any California upper tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such California upper tier crude oil at the time of the sale), exclusive of any crude oil transported through the trans-Alaska pipeline;

(C) Crude oil transported through the trans-Alaska pipeline (separately identifying ANS upper tier crude oil and ANS crude oil that is not subject to the ceiling price limitations of this part);

(D) Stripper well crude oil;

(E) Incremental tertiary crude oil;

(F) Tertiary incentive crude oil;

(G) Newly discovered crude oil;

(H) Market Level new crude oil;

(I) Heavy crude oil; and

(J) Other domestic crude oils the first sale of which is exempt from the provisions of this part—included in the volume of domestic crude oil so sold.

(2) *Time of certifications.* Each seller of domestic crude oil, other than a producer of domestic crude oil, shall make the certification required by this paragraph as soon as practicable after receipt of the required certifications from its sellers, but in no event later than 30 days following such receipt. However, if the domestic crude oil is not sold until after the expiration of the thirty-day period, the certification required by this paragraph shall be made within ten days following the sale of the domestic crude oil.

(3) *Actual volumes.* All certifications required by this paragraph shall relate only to the actual volumes of crude

oil included in any mixed blend of crude oil and other refined petroleum products and residual fuel oil.

(c) *Certification required for purchase or sale of crude oil.* No firm may sell domestic crude oil unless it provides the certification required by this section. No firm may knowingly purchase domestic crude oil for which there is no certification as required by this section; *Provided, however,* That the provisions of this paragraph do not apply to the sale of domestic crude oil to a firm under circumstances of economic or other coercion in which the buyer, because of its need for crude oil had no reasonable alternative but to purchase the domestic crude oil for which there is no certification, and such firm promptly reports the purchase to the Department of Energy for investigation.

(d) *Form of certification.* All certifications required by this section shall be in writing, either upon an invoice or billing or by separate instrument, and shall be effective only when delivered to and received by the purchaser of domestic crude oil.

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No. 82-771

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNION OIL COMPANY OF CALIFORNIA AND
TOSCO CORPORATION, PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Department of Energy reasonably interpreted its statutory authority under the now-expired Emergency Petroleum Allocation Act of 1973, 15 U.S.C. (& Supp. V) 751 *et seq.*, so as to permit an orderly phase-out of the Tertiary Incentive Program following President Reagan's decontrol of crude oil prices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 688 F.2d 797. The opinions of the district courts (Pet. App. 38a-54a, 72a-86a) are reported at 530 F.Supp. 717 and 532 F.Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1982. A petition for rehearing was denied on October 5, 1982. The petition for a writ of certiorari was filed on November 4, 1982. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).

STATEMENT

Following President Reagan's decontrol of crude oil prices in January 1981, the Department of Energy issued an interpretative ruling explaining that, inasmuch as the President's decontrol order had no retroactive effect on price controls, crude oil producers could, in conformity with long-standing regulations, adjust their prices for crude oil sold during the last two months of controls even though such adjustments might be based on costs incurred, paid and reported after controls had been removed. Petitioners contend that this interpretative ruling exceeded the scope of DOE's statutory authority insofar as it permitted producers to take advantage of a special program designed to encourage enhanced recovery techniques for two months following the expiration of price controls. As explained below, petitioners raise only a narrow issue of statutory construction that is of no continuing significance and that was, in any event, correctly decided by the court of appeals.

1. As oil fields are gradually depleted, producers are faced with the choice of either abandoning uneconomic wells or investing substantial funds to initiate enhanced recovery techniques, including "tertiary" methods to boost production from these wells. "Tertiary" techniques are generally high-cost production methods involving substantial risk of failure. In the mid-1970's, Congress recognized that such enhanced recovery techniques were of critical importance to the national objective of decreasing dependence on foreign oil.

Congress addressed this matter in 1976 by enacting an amendment to the now-expired Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. (& Supp. V) 751 *et seq.*, directing that the crude oil price regulations be amended to "provide additional price incentives for bona fide tertiary enhanced recovery techniques" (Section

122 of the Energy Conservation and Production Act (ECPA), Pub. L. No. 94-385, 90 Stat. 1133, 15 U.S.C. 757(j)(1)(A)). Pursuant to this congressional directive, DOE adopted a regulation, 10 C.F.R. 212.78 (1981), which provided that the volume of increased production of crude oil resulting from a qualified and certified tertiary recovery project would be exempt from price controls (43 Fed. Reg. 33679 (1978)). This regulation, by creating a new category of uncontrolled crude oil known as " 'tertiary incremental crude oil' " (Pet. App. 7a), was designed to encourage the development, expansion and continuation of tertiary recovery projects by permitting sale at free market prices of the increased production yielded by such projects.

After further study, DOE concluded that additional incentives were needed to assist those producers unable to finance tertiary projects unless some already-existing price-controlled crude oil could be sold at free market prices. Thus, on August 21, 1979, DOE amended 10 C.F.R. 212.78 (1981) to establish the Tertiary Incentive Program, which is the subject of this action (44 Fed. Reg. 51148 (1979)). The Program provided that producers could recoup up to 75% of certain specified expenses for tertiary projects by decontrolling sufficient volumes of price-controlled crude oil regardless of whether the project ultimately succeeded in increasing production.

For practical reasons, maximum allowable prices under the EPAA generally could not be determined until after the sales in a given month. Accordingly, producers were permitted up to two months after a sale in which to certify the category of crude oil sold (10 C.F.R. 212.131(a)(6) (1981)). Thus, as explained by the court of appeals (Pet. App. 8a-9a n.4), "the typical industry practice was to sell crude oil at an indeterminate price, with the understanding that the market price would be charged (*e.g.*, through retroactive invoicing) if the [producer was able to recertify the oil as tertiary

incentive] crude oil within the two months following the month of sale."

2. On January 28, 1981, President Reagan issued Executive Order No. 12287, 46 Fed. Reg. 9909-9910, which immediately exempted all crude oil and refined petroleum products from price and allocation controls. Approximately two weeks later, in response to industry and other public inquiries concerning the impact of Executive Order No. 12287 on the regulatory structure, DOE issued Ruling 1981-1 (46 Fed. Reg. 12945 (1981)). Answer # 7 of the Ruling (Pet. App. 95a) addressed the issues concerning a producer's ability to recover allowed tertiary expenses after January 28, 1981. DOE explained that, because the Executive Order did not have any retroactive effect on prices that could be charged for crude oil sold before January 28, 1981, a qualified producer could recover allowed expenses through the recertification of crude oil sold in December 1980 and January 1981, respectively, as long as the producer incurred, paid and reported those expenses prior to the end of the certification period on February 28 and March 31, 1981, respectively (*id.* at 95a-96a).

3. This litigation began in April 1981 when petitioners filed separate lawsuits challenging the validity of DOE's interpretation contained in Answer # 7 of Ruling 1981-1.[1] In *Union Oil Co.* v. *United States Department of Energy*, the United States District Court for the Central District of California held that Answer # 7 of Ruling 1981-1 was invalid because Executive Order No. 12287 terminated the operation of the tertiary incentive regulations, except as to those producers who incurred and paid tertiary expenses

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[1]Petitioner Tosco Corporation also challenged the procedural validity of the so-called "in-house" expense amendment to the regulations. The validity of that amendment, which was upheld by the court of appeals (Pet. App. 32a-36a), is not at issue here. See Pet. 7 n.19.

prior to January 28, 1981 (Pet. App. 38a-54a). With respect to the issue petitioners bring before this Court, the *Union Oil* district court held that Ruling 1981-1 was inconsistent with Congress' purpose in authorizing the Program, which, the court held, was "limited to correcting the disincentive to tertiary production that had inadvertently been created by the then existing price controls" and that existence of the Program after decontrol was unnecessary (*id.* at 47a, 66a-67a).

In *Tosco Corp.* v. *Department of Energy*, the United States District Court for the District of Nevada upheld the validity of Ruling 1981-1 (Pet. App. 72a-86a). The district court rejected the *Union Oil* court's finding that the operation of the tertiary incentive regulations did not survive the issuance of the President's decontrol order.

On September 1, 1982, the Temporary Emergency Court of Appeals of the United States reversed the *Union Oil* decision and affirmed that portion of the *Tosco* decision concerning Ruling 1981-1 (Pet. App. 1a-37a). Among other grounds, the court of appeals upheld the validity of Ruling 1981-1 as within the statutory authority granted by the EPAA. The court stated that "[b]y allowing tertiary expenses paid and reported between January 28 and March 31, 1981, to be recouped by releasing pre-decontrol oil to market prices, the Executive Order as interpreted by Ruling 1981-1 provided additional price incentives for tertiary projects. The Executive Order thus interpreted was consistent with the EPAA purpose of providing 'additional price incentives for bona fide enhanced recovery techniques' " (*id.* at 27a).

ARGUMENT

1. The decision below, construing the consistency of an agency interpretative ruling concerning a program that expired nearly two years ago with a statute that has likewise

expired, raises no issue of general importance warranting this Court's review. Petitioners do not even attempt to show that the court of appeals' decision has any continuing significance; instead, they argue that review by this Court is necessary because "the decision below undermines the role of the judiciary in assuring that agencies respect the boundaries established by Congress" (Pet. 9). But the principles governing judicial review of agency interpretations of statutes have long been settled: (1) the courts show "great deference to the interpretation given [a] statute by the officers or agency charged with its administration," *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), and (2) an agency's ruling will be upheld if it "was a reasonable choice of possible interpretations by the responsible agency. It is not required that the interpretation be the only reasonable choice." *Energy Consumers & Producers Association, Inc.* v. *DOE*, 632 F.2d 129 (Temp. Emer. Ct. App.), cert. denied, 449 U.S. 832 (1980).[2] The court of appeals applied these standards (Pet. App. 21a-22a, 36a), and there is thus no need for further review by this Court.

2. In any event, the decision below, rendered by "a court intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), is correct. Petitioners erroneously claim (Pet. 11) that the court of appeals "turned the legislative scheme on its head" by ignoring the true intent of Congress in authorizing the Tertiary Incentive Program. In petitioners' view,

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[2]Even greater deference is accorded agency interpretations of administrative regulations and executive orders. *Udall* v. *Tallman, supra*, 380 U.S. at 16 n.; *University of Southern California* v. *Cost of Living Council*, 472 F.2d 1065, 1068 (Temp. Emer. Ct. App. 1972), cert. denied, 410 U.S. 928 (1973). In the courts below, petitioners contended that Ruling 1981-1 conflicted with Executive Order No. 12287 and DOE's own regulations governing the Tertiary Incentive Program. The court of appeals rejected petitioners' claims (Pet. App. 22a-25a, 27a-30a), and petitioners have now abandoned those contentions.

Congress authorized tertiary incentives *solely* to alleviate the adverse effects of price controls on tertiary investments and, therefore, impliedly required that those incentives be terminated immediately upon decontrol even with respect to crude oil sold under price controls (Pet. 14-15). Petitioners' argument disregards the unambiguous language of the statute and rests upon a distorted view of its legislative history.

Nothing in the language of the statute suggests that Congress' *sole* concern was with the correction of disincentives to tertiary projects. On the contrary, the plain language of the statute directed amendments to the price control regulations for the express purpose of providing "*additional* price incentives for bona fide tertiary enhanced recovery techniques" (15 U.S.C. 757(j)(1)(A) (emphasis added)). The court of appeals found that Ruling 1981-1, by allowing the tertiary incentive regulations to run their normal course for the two-month period after decontrol in order to allow producers the opportunity to charge market prices for crude oil sold before decontrol, achieved the statutory goal of providing additional price incentives for tertiary projects, as Congress had intended (Pet. App. 27a).[3]

In concluding that Ruling 1981-1 was consistent with the express purpose of the statute, the court of appeals followed established judicial precedent. It is well settled that the most persuasive evidence of the purpose of a statute is the language of the statute itself. See, *e.g.*, *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940); *United States* v. *Missouri Pac. R.R.*, 278 U.S. 269 (1929).

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[3]This conclusion was based on DOE's determination, following a notice-and-comment rulemaking, that the tertiary incentive regulations had in fact accomplished the statutory goal of encouraging tertiary activity, which should result in increased domestic crude oil production that otherwise would not have occurred (Pet. App. 27a). Petitioners have never challenged this finding.

Thus, the court of appeals correctly recognized that "[w]here the language of the enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." Pet. App. 26a n.22, quoting *Church of Scientology* v. *Department of Justice*, 612 F.2d 417, 429 (9th Cir. 1979). See also *Howe* v. *Smith*, 452 U.S. 473, 483 (1981) (when terms of a statute are unambiguous, judicial inquiry is complete, except in " 'rare and exceptional circumstances' "); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981) (same).

Notwithstanding the unambiguous language of the statute, petitioners argue that the legislative history of the tertiary incentive amendment to the EPAA demonstrates that Congress intended solely to correct the disincentives to tertiary investments caused by price controls. This erroneous and unreasonably narrow view is based on selective portions of the legislative history quoted by petitioners (Pet. 12-14).

In fact, the legislative history as a whole demonstrates that Congress intended to provide additional incentives for tertiary investments *by means of*, rather than simply *because of*, the existing price control structure. For example, in his closing remarks, Senator Montoya, on whose statements petitioners rely so heavily (Pet. 12-13), stated (122 Cong. Rec. 18492-18493 (1976) (emphasis added)):

> [T]he only way that we can stimulate production and draw more secondary oil through these new methods is by providing an incentive. *The only incentive that we can arrive at is to give the industry the power to do this with an advanced price structure.*

The Conference Report affirmed the objective of providing additional price incentives for enhanced recovery techniques by means of the existing price structure (S. Conf.

Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976) (emphasis added)):

> There is also general agreement that *current economic circumstances would permit adjustments to the pricing mechanism* contained in the Energy Policy and Conservation Act *to give needed additional incentives* for the application of high-cost enhancement techniques which today are not economical. * * * [T]he conference substitute seeks to obtain *the objective of providing additional price incentives for high-cost enhancement techniques by equipping the Administration with greater flexibility to provide for such incentives within the framework of the existing price regulatory structure.*

Thus, petitioners' contention that Congress' sole objective in enacting the tertiary incentive amendment was to correct the adverse effects of price controls is not supported by either the language of the amendment itself or its legislative history. At most, the portions of the legislative history quoted by petitioners demonstrate the existence of differing views concerning the obstacles to tertiary investments.[4] They do not show any conflict over the ultimate purpose of the amendment—to encourage investments in tertiary projects.

Finally, even assuming that petitioners' limited view of the statutory purpose behind the Tertiary Incentive Program is correct, Ruling 1981-1 was consistent with, and indeed advanced, that purpose. The operation of the tertiary incentive regulations for two months after decontrol

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[4]In the preamble to the final regulations establishing the Tertiary Incentive Program, DOE identified the "two most significant impediments" for investment in tertiary projects: (1) the high risk involved, and (2) the relatively low technological level of many enhanced oil recovery techniques. 44 Fed. Reg. 51148 (1979). The preamble did not even mention price controls as a major "impediment."

served to "correct disincentives" to tertiary production caused by price controls, because it allowed market prices to be charged for crude oil sold during the period of price controls and therefore encouraged early initiation of tertiary activity that directly related to crude oil sold when price controls were in effect.

Acceptance of petitioners' position would create a bizarre anomaly during the last two months of price controls. Petitioners would subject crude oil sold during that time to controlled prices even though oil sold earlier would have been recertified as tertiary incentive oil and sold at market prices and oil sold later would have been uncontrolled oil and sold at market prices. This result would not have "let the market work" (see Pet. 13) with respect to sales of crude oil during the last two months of controls, but would have had the adverse and anomalous effect of depriving crude oil producers of vital revenues that could never be recovered. Not only would new projects have been cancelled, but existing projects would have been seriously affected. See 46 Fed. Reg. 36103 (1981). Whether one views Congress' purpose as providing additional incentives or as removing disincentives, it cannot be said that it was ever Congress' intent to require the President and DOE to carry out decontrol in a manner that would *impose* disincentives on tertiary investments. Yet this is the precise result that would occur if petitioners' view were to prevail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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